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No. 03-475

In the Supreme Court of the United States

RICHARD B. CHENEY,
VICE PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX
VOLUME II

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PETITION FOR WRIT OF CERTIORARI FILED: SEPT. 30, 2003
CERTIORARI GRANTED: DEC. 15, 2003

TABLE OF CONTENTS

District Court Docket Entries, No. 01-1530 1
District Court Docket Entries, No. 02-631 8
Court of Appeals Docket Entries 10
Second Amended Complaint, Case No. 01-1530 16
Attachment 1:
Howard Fineman and Michael Isikoff, "Big Energy at the Table," *Newsweek*, May 14, 2001 43
Attachment 2:
Howard Fineman and Michael Isikoff, "A New Capitol Clash," *Newsweek*, Feb. 11, 2002 51
Attachment 3:
David Lazarus, "Memo Details Cheney-Enron Links," *San Francisco Chronicle*, Jan. 20, 2002 57
Attachment 4:
Michael Weisskopf and Adam Zagorin, "Getting the Ear of Dick Cheney," *Time*, Feb. 11, 2002 38
Attachment 5:
Letter from David S. Addington, Counsel to the Vice President, to Rep. Tauzin et al., May 4, 2001 71
Attachment 6:
Transcript of ABC News: *Nightline*, July 25, 2001 84
Attachment 7:
Decision of the Comptroller General Concerning NEPDG Litigation, Jan. 30, 2002 103
Attachment 8:
Letter from Judicial Watch, [illegible]. to The Hon. Richard B. Cheney, June 25, 2001 109
Attachment 9:
Letter from David S. Addington, Counsel to the Vice President, to Larry Klayman, July 5, 2001 123

Table of Contents—Continued: Page

Attachment 10:
Joseph Kahn, "Cheney Withholds List of those Who Spoke to Energy Panel," *The New York Times*, June 26, 2001, at A17 125
Express Wire Services, "Cheney Won't Give Up Names," June 26, 2001 128
Scott Lindlaw, "Congress Demands List of Participants in Cheney Energy Meetings," *AP*, June 25, 2001 130
Attachment 11:
Letter from David S. Addington, Counsel to the Vice President, to Rep. Henry Waxman, Jan. 3, 2002 134
Complaint, Case No. 02-631 139
Presidential Memo., Jan. 29, 2001 156
Plaintiffs' Proposed Discovery Plan 160
Defendants' Objections to Plaintiffs' Proposed Discovery Plan 166
Transcript of Status Hearing, Aug. 2, 2002 186
Plaintiffs' First Request for Production of Documents 215
Plaintiffs' First Set of Interrogatories 224
Defendant's Response to Plaintiffs' First Set of Interrogatories and Request for Production 231

Volume II

Declaration of Karen Knutson 235
Order, Sept. 9, 2002 242
Transcript of Omnibus Motions Hearing, Oct. 17, 2002 245
Defendant's Amended Motion for Certification Pursuant to 28 U.S.C. 1292(b) and for Expedited Consideration of This Motion 279
Defendant's Response to Order of Oct. 28 282
Transcript of Motions Hearing, Oct. 31, 2002 285
Order, Nov. 1, 2002 327

Table of Contents—Continued: Page

Notice of Appeal 337
Emergency Petition for Writ of Mandamus 339
Emergency Motion for Stay Pending Appellate Review 368
Memorandum Opinion and Order, Nov. 26, 2002 383
Petition for Rehearing and Suggestion for rehearing En Banc 416
Response to Petition for Rehearing and to Suggestion for Rehearing En Banc 447

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 01-1530 (EGS)

JUDICIAL WATCH, INC., ET AL., PLAINTIFFS

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP,
ET AL., DEFENDANTS

C.A. No. 02-631 (EGS)

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, ET AL.,
DEFENDANTS

DECLARATION OF KAREN Y. KNUTSON

I, Karen Y. Knutson, hereby DECLARE:

1. I am a full-time employee of the Vice President of the United States appointed pursuant to Section 106 of Title 3 of the United States Code. My title is Deputy Assistant to the Vice President for Domestic Policy. From on or about February 6, 2001 to April 2, 2002, I was a full time employee of the U.S. Department of Energy (DOE) on assignment to the Office of the Vice President. Within that period, from on or about February 6, 2001 through September 30, 2001, my responsibility in the Office of the Vice President was to provide staff support to the National Energy Policy Development Group ("NEPDG"). My title when I performed

that responsibility was Deputy Director of the NEPDG. The NEPDG was created by a memorandum of President of the United States George W. Bush of January 29, 2001. At the end of the last day of fiscal year 2001, on September 30, 2001, the NEPDG ceased to exist by operation of that Presidential memorandum.

2. This Declaration is based on my personal knowledge and on information available to me in my official capacity.

3. Of the professional personnel in the Office of the Vice President who were responsible for providing the staff support to the NEPDG from February 2001 through September 30, 2001 I am the only one who is currently employed by the Vice President. Andrew Lundquist was a DOE full-time employee on assignment to the Office of the Vice President with the responsibility from February 2001 through September 30, 2001 to provide staff support to the NEPDG. His title during that period was Executive Director of the NEPDG. After the termination of the NEPDG on September 30, 2001, he was a DOE assignee, and then detailee, to the Office of the Vice President through March 26, 2002. On March 26, 2002, Mr. Lundquist left Federal Government service and at all times since then he has worked in the private sector. The NEPDG ceased to exist on September 30, 2001 and Mr. Lundquist ceased at that time to be the Executive Director of the NEPDG; therefore, when Mr. Lundquist left Federal Government employment, no one replaced him in his former capacity as Executive Director of the NEPDG.

4. As directed by the President in his memorandum of January 29, 2001, the NEPDG consisted of the following officers of the Federal Government: Vice President Cheney, Secretary of the Treasury O'Neill, Secretary of the Interior Norton, Secretary of Agriculture Veneman, Secretary of Commerce Evans, Secretary of Transportation Mineta, Secretary of Energy Abraham, Director of the Federal Emergency Management Agency Allbaugh, Administrator of the Environmental Protection Agency Whitman, Assistant to the President and Deputy Chief of Staff for Policy Joshua Bolten, Assistant to the President for Economic Policy Lawrence Lindsey, and the Assistant to the President for Intergovernmental Affairs. Additionally, in accordance with the terms of the Presidential memorandum of January 29, 2001, the Vice President invited the participation of Secretary of State Powell when the work of the NEPDG involved international affairs, and, as appropriate, the participation of Director of the Office of Management and Budget Mitchell Daniels. Finally, because the President had not appointed an individual with the title Assistant to the President for Intergovernmental Affairs, the Vice President invited, as appropriate, the participation of Deputy Assistant to the President and Director of Intergovernmental Affairs Ruben Barrales. The NEPDG consisted of these officers of the Federal Government, and no one else.

5. The above-named officers of the Federal Government, in their participation in the NEPDG, performed the functions set forth for them in the President's memorandum of January 29, 2001: to gather information, deliberate, and, as specified in the President's memorandum, to make recommendations to the President for a national energy policy. The Vice President performed the additional duties assigned to him by the President's memorandum of January 29, 2001 of presiding at the meetings of the NEPDG and

directing its work. On May 16, 2001, the Vice President, on behalf of the NEPDG, submitted to the President for his consideration the recommendations known as the Report of the National Energy Policy Development Group.

6. During the period of the existence of the NEPDG, the NEPDG was supported by five professionals employed by the Department of Energy who were originally assigned to the Office of the Vice President for the purpose of providing such support: an Executive Director of the NEPDG (Andrew Lundquist); a Deputy Director of the NEPDG (me); two Senior Professional Staff Members, and a Professional Staff Member. In addition, a White House Fellow assigned to the Office of the Vice President provided support to the NEPDG. This support staff for the NEPDG also had one staff assistant who provided clerical support. All of these individuals responsible for providing staff support to the NEPDG were full-time Federal employees.

7. The NEPDG met twelve times. The dates of the twelve meetings were: January 29, February 9 and 16, March 12 and 19, April 3, 11, and 18, May 2, 4 and 16, and July 13, 2001. All twelve meetings occurred in Washington, D.C. At the January 29, 2001 meeting, the President announced the formation of the NEPDG. Other meetings of the NEPDG may have been scheduled, but did not occur because they were cancelled or rescheduled.

8. Within the Office of the Vice President, personnel of the NEPDG support staff attended the NEPDG meetings as follows: the NEPDG Executive Director (Mr. Lundquist) attended all the meetings; the NEPDG Deputy Director (me) attended all the meetings, except

for the meeting on January 29, 2001; the senior of the two Senior Professional Staff Members attended approximately seven or eight of the meetings, but did not attend the meetings on January 29 and February 9, 2001; the junior of the two Senior Professional Staff Members attended one of the meetings; the White House Fellow attended all of the meetings, except for the meeting on January 29, 2001; the Professional Staff Member attended the meetings of April 3, 11, and 18 and May 2, 4 and 16; and the staff assistant who provided clerical support attended all of the meetings, except the meetings on January 29, February 9, and May 4, 2001.

9. Also, the following individuals employed on the Vice President's staff attended one or more of the NEPDG meetings: Chief of Staff to the Vice President, Deputy Chief of Staff to the Vice President, Counselor to the Vice President, Assistant to the Vice President for Legislative Affairs, Assistant to the Vice President for Domestic Policy, Deputy Assistant to the Vice President for Public Affairs, Deputy Assistant to the Vice President for Legislative Affairs (Senate), and the Press Secretary to the Vice President. These individuals at the time of their attendance were and still are full-time Federal employees, except for the individual who then was Press Secretary to the Vice President, who was at the time of her attendance a full-time Federal employee but who left Federal service on January 31, 2002 and is now in the private sector.

10. For each of the twelve meetings, the Office of the Vice President strictly limited those whom it invited to officers and employees of the Federal Government. The Office of the Vice President invited the officers of the Federal Government who constituted the

NEPDG, and invited each such officer to be accompanied by one employee of that officer's department, agency or office. On rare occasions, such an officer would be accompanied by more than one employee of that officer's department, agency or office. To the best of my knowledge, no one other than the officers of the Federal Government who constituted the NEPDG, the Federal employees whom they chose from their respective departments, agencies and offices to accompany them (all of whom were full-time Federal employees), and the Office of the Vice President personnel set forth above, attended any of the meetings.

11. The Presidential memorandum of January 29, 2001 establishing the NEPDG authorized the Vice President to establish subordinate working groups to assist the NEPDG in its work. The Vice President did not establish any such working groups.

12. The Executive Director of the NEPDG proposed in February 2001 the establishment of a detailed structure of targeted working groups on a series of subjects, with a subset of the departments, agencies and offices whose heads were on the NEPDG to constitute each such targeted working group, but that proposal was not implemented.

13. The Executive Director of the NEPDG also gave the label "Working Group," which sometimes was also referred to as the "Staff Working Group," to a collection of staff-level Federal employees with whom he worked in drafting the Report of the NEPDG. That staff-level group held numerous meetings regarding drafting of the Report. To the best of my knowledge, the only attendees at such meetings were full-time Federal employees of the departments, agencies, and offices whose heads constituted, with the Vice President, the

NEPDG, with one exception. The exception is that one individual, Joan C. O'Callaghan, doing business under the trade name The Communications Collective, was engaged to help provide technical writing and graphic design services relating to production of the NEPDG Report and attended brief portions of meetings—two or three, but not more than three—of the staff-level group as it worked on preparing the NEPDG Report; she did not participate in deliberations on or development of energy policy recommendations nor provide energy policy advice or recommendations, but rather provided technical writing and graphic design services in the preparation of the NEPDG Report. I do not recall how many meetings of the staff-level group occurred or precisely which employees attended, nor did the Office of the Vice President to the best of my knowledge keep records at such meetings that reflect such information.

14. It is my understanding that the plaintiffs in this lawsuit have alleged that the following individuals regularly attended and fully participated in the meetings of the NEPDG: the four individuals in the private sector who were named by Judicial Watch, Inc. as defendants in its Second Amended Complaint (see paragraph 25) in this lawsuit, other, unnamed, individuals who were private lobbyists, and other unnamed individuals who were energy industry executives. No such individuals attended or participated in any meetings of the NEPDG or the Staff Working Group.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Washington, D.C. on September 3, 2002.

/s/ KAREN Y. KNUTSON
KAREN Y. KNUTSON

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 01-1530 (EGS)

JUDICIAL WATCH, INC., PLAINTIFFS

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP,
DEFENDANT

C.A. No. 02-631 (EGS)

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, *ET AL.*,
DEFENDANTS

ORDER

The Court hereby sua ponte

ORDERS that plaintiffs shall file any detailed responses to defendants' motion for a protective order and for reconsideration by no later than **September 16, 2002**; and it is

FURTHER ORDERED that any motions to compel shall be filed by no later than **September 16, 2002**; and it is

FURTHER ORDERED that any replies to the responses to defendants' motion for a protective order and for reconsideration, and any responses to motions

to compel shall be filed by no later than **September 23, 2002**; and it is

FURTHER ORDERED that any replies in support of motions to compel shall be filed by no later than **September 25, 2002**; and it is

FURTHER ORDERED that the status hearing scheduled in this matter for **September 13, 2002** is cancelled, and the hearing is rescheduled for **September 30, 2002 at 11:00 a.m.** in Courtroom One; and it is

FURTHER ORDERED that no potentially dispositive motions shall be filed in this matter until further order of the Court.

IT IS ORDERED.

Signed: EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE
September 9, 2002

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA-01-1530

JUDICIAL WATCH, INC., PLAINTIFF

SIERRA CLUB, NATURAL RESOURCE DEFENSE COUNCIL, AMICUS

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP, ET AL., DEFENDANTS

TRANSCRIPT OF OMNIBUS MOTIONS HEARING
BEFORE THE HONORABLE EMMET G. SULLIVAN
UNITED STATES DISTRICT COURT JUDGE

Washington, D.C.
October 17, 2002

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FOR THE DEFENDANT:

JENNIFER PAISNER, ESQ.
SHANNEN W. COFFIN, ESQ.
CRAIG BLACKWELL

[3]

PROCEEDINGS

THE CLERK: Civil Action 01-1530, Judicial Watch, Inc., Sierra Club, Natural Resource Defense Council, versus National Energy Policy Development Group. May I have counsel identify themselves, please?

MR. BOOKBINDER: For the plaintiff Sierra Club David Bookbinder, with me are my colleagues Sanjay Narajay and Roger Adelman.

THE COURT: All right, good morning.

MR. BOOKBINDER: And on the telephone Alex Levinson.

THE COURT: All right. Mr. Levinson.

MR. LEVINSON: Yes, I'm here.

THE COURT: All right. And for the government?

MR. COFFIN: Your Honor, Shannen Coffin.

THE COURT: All right. And your colleagues, who are they?

MR. BLACKWELL: Craig Blackwelly, Your Honor.

MS. PAISNER: Jennifer Paisner, Your Honor.

MR. KLAYMAN: Your Honor, Larry Klayman on behalf of Judicial Watch on the line.

[4]

THE COURT: All right, Mr. Klayman, good morning. I'm not persuaded by the government's motion that I should reconsider my ruling, nor am I persuaded that I should grant the equivalent of the protective order.

Now, Mr. Coffin, I'll afford you a few minutes not much more than that though to convince me otherwise.

Now, in doing I'd like for the government as well as the plaintiffs to address this thought, and it's just a thought that I want to share with counsel, maybe the approach by the court at this point should be along the lines of the following. Maybe the court should direct the government to prepare the equivalent of a privilege log, submit it under seal for the court's consideration, along with whatever documents that the government is of the opinion are protected pursuant to whatever privilege is invoked and give the court an opportunity to determine whether the government's assertion of privilege is appropriate.

I guess that another approach would be for the court to appoint the equivalent of a Special Master, maybe a retired judge, and direct that the [5] government go through that procedure that I've just described with that Special Master affording the government's counsel an opportunity to appear before that person as appropriate and argue as appropriate in an effort to persuade the Special Master that the government's privilege, or privileges, that it has invoked are indeed permissible under the law. And then direct that Special Master to file a report with the court and I'd determine whether the privileges have been properly asserted and that there is a basis in law to support the privileges that have been asserted.

That was the approach that was followed by the court I believe, actually that was the approach that was discussed by the Circuit Court in the Gelands case. I'm not quite sure what happened when the case was remanded to the District Court.

I'm sharing those thoughts because maybe it is appropriate at this juncture for the court to carve out a middle ground since obviously battle lines have been

drawn and it appears that the government's position is clear that not only will the government produce discovery it won't respond to discovery requests and assert the privilege that everyone must assert.

[6]

Now, having said that, Mr. Coffin, I'd give you a chance to address those two thoughts as well as any principal point. I've considered your motion more than once, I've considered your arguments and I'm not persuaded by them, and I'm not going to give the parties, anyone, a great deal of time this morning to make their arguments that you've already made very eloquently in writing. I've already considered the arguments but if there is something that I've overlooked, Mr. Coffin, you need to tell me what it is and also address those two thoughts that the court has shared with counsel for the parties.

MR. COFFIN: Good morning, Your Honor. Thank you for continuing the hearing from last week to accommodate my schedule. I appreciate that.

THE COURT: Sure, no problem.

MR. COFFIN: Let me address your point. I don't believe that the middle that you've suggested actually is how Gelands proceeded because before it went through that process—

THE COURT: No, no. What I said was that's what the Circuit Court discussed. I don't know what happened when the case was remanded.

MR. COFFIN: I'm talking about the actual [7] Circuit Court decision. Before the court did that it satisfied itself that there was a need to do that, that there was

sufficient substantiation of the claims. And the court said there was a claim there—

THE COURT: Well I've already determined that discovery is appropriate.

MR. COFFIN: Well, Your Honor, we have complied with discovery to the tune of 35,000 documents.

THE COURT: You won't assert the privilege, you refuse to assert the privilege, although everyone, including the President of the United States, has to assert the privilege if that person is relying upon it.

MR. COFFIN: Well I don't—

THE COURT: The government takes the position that it's not going to assert the privilege, that it's not going to respond to court's order, that it's not going to produce anything nor will it assert the privilege because asserting the privilege is, as I understand your argument, unconstitutional.

MR. COFFIN: Let me say that—

THE COURT: I mean that's your argument.

[8]

MR. COFFIN: Yes. And there is abundant support for the procedure we're requesting. In *United States v Nixon* itself—

THE COURT: All right. Do you have any authority, sir, that is different from the authority that you've relied upon in your written pleadings because that written authority that you relied upon in your pleadings is not persuasive at all.

MR. COFFIN: Your Honor, the Poindexter case discussed this very point and Judge Green said I don't have to require a formal assertion of privilege which

itself puts a burden on the executive and the executive's confidentiality, I don't have to go that far before—

THE COURT: This court isn't requiring the government to produce privilege documents.

MR. COFFIN: No, but you're requiring us to perfect the privilege.

THE COURT: I'm telling the government that if you have the privilege then assert it and telling me the reasons why you're asserting it so that I can then determine whether your assertion of the privilege is appropriate or not. Everyone has to do that. Why should these defendants, who are [9] not Presidential defendants, be excused from doing what everyone else under the law has to do?

MR. COFFIN: Your Honor, the Vice President of the United States is the principal defendant in this case and I suggest to you that the concern for undue interference with the effective operation of the Executive Branch requires special treatment by this court in this context.

As the Clinton decision said that special caution is appropriate if the materials or testimony sought by the court relate to a President's official activities. There is no question that if executive privilege is implicated the President of the United States is implicated and these are documents that go to advice that was given to the President of the United States.

THE COURT: Well these defendants—let's assume a hypothetical, let's assume they're minutes of a meeting on a given day, the defendants before this court should not be put to the task of identifying that they are

minutes for a meeting that those minutes are indeed privileged and articulate the reasons why?

MR. COFFIN: Your Honor, one of the [10] standards that the court suggests in establishing need is that the evidence not be available—

THE COURT: Can you just answer my question?

MR. COFFIN: I am answering your questions. That the evidence not be available through due diligence from other sources, and there are now eight to ten agencies that are involved in this case that are not asserting any sort of executive privilege and are open to discovery in this case, and have in fact complied substantially with the discovery requests that are at issue in this case. So there are other sources.

And plaintiffs haven't come to you, Your Honor, and said in any way, shape or form that we've looked at those documents and we can't prove our case through those documents and that testimony.

And so, Your Honor, yes, that is exactly the case that if there is a way of proving who at the meetings, who was at any NEPDG meetings through other means the due deference to the executive requires this court to require that exhaustion of the plaintiffs. That is our position.

THE COURT: All right. Any new authorities that you want me to take a look at?

MR. COFFIN: Your Honor, we've cited all of the authorities in our brief. And I call your attention to the *Armstrong* decision, Your Honor. *Armstrong* is a very important case here because that involved the same sort of standards that we're asking for this court to apply in the context of a selective prosecution claim.

The court reasoned that a showing necessary to obtain discovery against the Executive Branch should itself be a significant barrier to the litigation of insubstantial claims and it did that for two reasons. First, judicial deference to the decision of executive officers stems from a concern not to unnecessarily impair the performance of core executive functions and, second, there is a presumption of regularity that is due to the conduct of government officials.

THE COURT: Well that's what you've been arguing since January of this year that there shouldn't be any discovery in this case.

MR. COFFIN: No, Your Honor, there is a substantial difference that you're missing, 35,000 documents and responses from me to the agencies, [12] that is a major difference in this case. It puts this case in a much different setting because plaintiffs have access to all of the information they need to prove their case and they don't have a single shred of evidence that anyone other than government officials were involved in the meetings of the NEPDG. There is not a single shred of evidence and that's the problem with their case.

You can't allow discovery here because there is no substantiation of the claim even though there are tons of sources for that information.

THE COURT: And still the government's argument is again there must be a need articulated by the plaintiffs before discovery can go forward?

MR. COFFIN: That's correct, Your Honor. That's correct, that is our position.

THE COURT: Well the reason why the government sought a protective order was because of your representation that you were about to file a motion for

summary judgment and you thought that there should be a protective order in place of your plan to file a motion, which I said you file until I resolve the discovery dispute. So, that factual predicate has been—

MR. COFFIN: But—

[13]

THE COURT: Just a minute, don't interrupt me. You have a habit of interrupting me, sir. You did this last year.

MR. COFFIN: I apologize.

THE COURT: I know. I invite advocacy but I will not tolerate attorneys interrupting me.

MR. COFFIN: Yes, sir.

THE COURT: All right, fair enough. I won't interrupt you.

Read that last line back.

(The statement was read back.)

THE COURT: I think that the request for a protective order was the government's desire to file a motion for summary judgment and I said no, don't file a motion for summary judgment unless or until the court resolves the discovery dispute.

MR. COFFIN: Right.

THE COURT: So that factual predicate having been removed then what is the factual predicate now for the government's assertion that it need not assert the privilege, that the plaintiffs have not established the need, is that essentially it?

MR. COFFIN: No, Your Honor, it's not. In [14]

my mind the summary judgment motion was a convenient vehicle for you to understand what the evidence—

THE COURT: A convenient vehicle for the government to proceed with and I said no, we're not at the summary judgment stage and we won't be at the summary judgment stage until I resolve discovery.

MR. COFFIN: Your Honor, as we said in one of our reply briefs we did say that we don't think that it was a necessary vehicle, it was simply a convenient vehicle. In our last reply brief we explained to you, we summarized to you, what the evidence was that was out there and that—

THE COURT: Well if that is the vehicle then it puts the burden on the plaintiffs to demonstrate a need.

MR. COFFIN: Your Honor, that is exactly right.

THE COURT: All right, fine.

MR. COFFIN: That is exactly right.

THE COURT: Answer the question then, the factual predicate then is that they haven't demonstrated need.

MR. COFFIN: Oh, that's exactly right, it [15] was just that the vehicle for doing that was to put in the context of a summary judgment motion. We didn't think that that was necessary and Your Honor, you know although we disagree with your not allowing us to file a summary judgment motion we don't think that it is a necessary vehicle. Certainly can be done here because plaintiffs have to demonstrate need.

THE COURT: All right. Anything new?

MR. COFFIN: Your Honor, I can move on to one of the—

THE COURT: I've considered the arguments that you've made in your brief and I'm not persuaded by them. Is there any new argument that you wish to make?

MR. COFFIN: Your Honor, there aren't any new arguments.

THE COURT: Thank you. I'll hear from plaintiffs counsel.

MR. KLAYMAN: Your Honor, Larry Klayman, good morning.

As occurred at the last hearing, that was the August 2nd hearing, we were concerned that the government, in this case the Bush-Cheney administration would allow the 30 days that Your [16] Honor ordered to produce documents or object with regard to the Cheney Energy Task Force itself, not the peripheral agencies that are involved but the Task Force itself, that it would allow that 30 days to tick off to try to delay this proceeding because it is apparent to us that what they are trying to do is get beyond an election period. We have no interest in the elections, the court has no interest in the elections, but we want the documents for the public as soon as possible.

It's been a year and a half since this matter was filed. At the current pace of the litigation nothing will be made available probably until after 2004 and this administration may no longer be in charge of the White House at that time.

My suggestion here is, and I think that Your Honor is touching upon it is that this Bush-Cheney administration and the defendant in this case is in a contempt situation right now. They have defied your order.

THE COURT: That's not an issue before the court, counsel. The only issues that I'm going to focus on today are the motion for reconsideration and the motion for protective order. I recognize [17] that there have been additional pleadings filed, those other matters are not before the court today.

MR. KLAYMAN: Okay. Well my point if that if Your Honor can set a short timeframe I think that's important because I believe the strategy of the government, and I've seen it in other cases here, is that whatever Your Honor orders in terms of a timeframe in or about the end of that time period they will be filing a petition for a writ of mandamus with the D. C. Circuit, it will not be meritorious but what they are going to try to do is to try and slow this matter down further.

So, consequently to keep the timeframe short if they are going to use that technique, however improper, and they've used it in other cases that we've been involved with, let them use it quickly so that we can get up to the D. C. Circuit and have this thing resolved, otherwise by the time that this case is litigated this administration will be out of office.

That's basically my observation. I agree with Your Honor's approach but I think that there needs to be a short timeframe for producing the documents, for producing claims of privilege.

THE COURT: All right, thank you, counsel.

[18]

MR. NARAYAN: Your Honor, I just want to address the two matters that you raised.

THE COURT: Sure, go ahead.

MR. NARAYAN: I refer to the privilege of producing a privilege log and documents under seal to the court. I certainly have no problem with producing reportedly privileged documents under seal. With regard to the privilege log and unprivileged documents we think that there is no need to place those under seal for two reasons. One reason is that at this stage I think we too are a bit concerned about delay here. What we've asked for in this case is a declaratory judgment and information and the value of those things does go down as the issues that we're investigating in this case get further and further into the past, and in particular as the administration's energy policy becomes something that is no longer—

THE COURT: So in other words you're suggestion along the lines of the court's thoughts would be for the court to essentially follow the procedures the court would follow in a FOIA case for instance, have the government produce a privileged log, which you would have access to but not necessarily the rationale behind the assertions [19] of privilege and the court would review those documents, those evidence materials, in camera. Is that right?

MR. NARAYAN: That's right, Your Honor.

And the other thing is that a privilege log would allow us to maybe structure further discovery in a way that might be useful to us.

THE COURT: Is there a requirement that the plaintiffs demonstrate a need at this point?

MR. NARAYAN: No, Your Honor, there isn't. Although the defendants have said a lot about the separation of powers and the constitution what we're

talking here about is production of non-privileged documents and the privilege log.

THE COURT: Which is what is required of everyone, is it not?

MR. NARAYAN: Yes, Your Honor. And those don't effect the functioning of the executive, they haven't shown any in which that could effect the functioning of the executive in any way that could possibly implicate separation of powers. And in all of the cases that they have cited and the cases that we've cited it's clear that any separation of powers the analysis focuses on functioning not the simple status of the fact that people have desks in [20] the White House, or at one point had desks in the White House.

In any event they say that we have access to other evidence, but until we know what we don't have it's very hard to say whether we can get those things from the agency or not. At a minimum here there is no intrusion on executive function in a way that would implicate separation of powers.

THE COURT: Because I'm not ordering the defendants to turn over any privileged documents whatsoever. I'm just telling them to turn over those documents that aren't privileged pursuant to the panoply of discovery rules that are in place. But for those items that the privilege attaches just tell me what the privilege is.

MR. NARAYAN: That's right, Your Honor, they haven't indicated a single specific document that the disclosure of which would effect the executive's functioning.

THE COURT: Well they haven't identified the documents.

MR. NARAYAN: Well, right, they haven't identified any specific documents at all.

THE COURT: They are essentially saying we don't have to respond to any discovery request and [21] we don't have to assert a privilege because responding to a request for discovery is as unconstitutional as well as providing discovery, if I understand their argument correctly.

MR. NARAYAN: I think that *Clinton v. Jones* adequately disposes of the contention that these simple steps of litigation somehow effect the executive in a way that offends separation of powers anyway.

THE COURT: If the court were to deny the request for reconsideration and deny the request for a protective order then what from the plaintiffs point of view?

MR. NARAYAN: Well then we wouldn't get any non-privileged documents and we'd get a privilege log.

THE COURT: And then the next step is what, the court would have to focus on the motion to compel, or is there a need to do that?

MR. NARAYAN: The motion to compel addressed the production by the agencies and they largely center on separate issues. I don't think that there is any reason to—at this point they are proceeding on separate tracks.

MR. KLAYMAN: Your Honor, to get back to [22] the earlier issue. This is Mr. Klayman.

THE COURT: Just a minute counsel. I want to hear from you but I want plaintiff's counsel, your co-counsel to finish. Can you hear, counsel?

MR. KLAYMAN: Yes. I thought that he was. Thank you.

MR. NARAYAN: The next step would be we intended this discovery to provide a foundation for further focus discovery based on what shows up here. So, the next step would be depending on what we see we might have follow up discovery requests. Again it's hard to say without knowing what is out there and we might also have some questions about the privileges that they are raising in their privilege log. In other words, we would proceed like any other normal civil case.

With regard to the Special Master, Your Honor, I think our only concern there is the potential there for delay again.

THE COURT: When I made reference to that procedure I wasn't by any stretch of the imagination finding as a fact, finding as a matter of law that there had to be a need demonstrated. I just focused on that procedure that was put in place, that's all. And so I guess when you're [23] thinking this through why would there be a need to have an intermediary step when in the final analysis the court would have to make the decisions in any event. And the court is most capable of making those decisions in the first instance and why burden someone else.

MR. NARAYAN: That's all that we have, Your Honor.

THE COURT: All right. Mr. Klayman.

MR. KLAYMAN: Yes, Your Honor. What I'm suggesting to clarify the earlier position, I realize that these other motions for show cause orders for contempt are pending but what we would ask for the court today

is a definitive order they comply with Your Honor's orders of August 2nd set a short timeframe, they are not going to comply with it in any event, they've made that clear.

THE COURT: Why is there a need for the court to issue another order? I issued one order. I mean is there a need for the court to issue another order, are you essentially saying I mean it this time? I don't think so, is there?

MR. KLAYMAN: I mean you want to go through the compel procedure. I thought that you were suggesting that he wanted an interim order to [24] comply is that's Your Honor's approach. I feel that they are in contempt right now, I agree with you.

THE COURT: Well, contempt is not an issue before the court.

MR. KLAYMAN: Well the Your Honor can decide on the motions at the appropriate time but I'm just concerned and I want to make sure that my position is stated clearly. I'm concerned that we need to know where we stand with regard to this Bush-Cheney administration, whether they are going to produce or whether they are going to claim privileges and not to allow time to tick off for them to then allow that time to expire, only to have them take what is in effect an appeal to the D.C. Circuit which will then shut this case down, you know, for six months to a year. We need to know where they stand right now and I think that we know where they stand. They do not intend to comply with your orders, they've told you that. They don't have any inclination to accept what they are at least with regard to the internal documents inside the task force itself and to give them, you know, a fourth bite of the

apple. I agree with what your is saying that you have already ruled, it [25] would not be appropriate.

So, yes, they've produced some documents and the documents that they've produced and not produced with regard to the agencies they should be what those privileges are. But with regard to the documents that they have just basically refused to produce or refuse to even claim privilege that issue in my view is beyond giving them a fourth bite of the apple and they should be ordered to produce them immediately. Quite apart whether you hold them in contempt they should be ordered to produce them tomorrow.

THE COURT: So in response the to question that I asked counsel what should be the next step for the court to take, assuming that the court denies the request for reconsideration and denies the motion for protective order?

MR. KLAYMAN: The next step should be with regard to the documents inside the task force. If they are not prepared to make a commitment today that those documents are going to be produced forthwith Your Honor would have to take appropriate measures to enforce the powers of the court quickly without allowing time to expire here. Their entire [26] strategy is delay, that's why it is, and that's why they are willing to thumb their nose in the face of the court. It's the same strategy used by prior administrations going all of the way back in modern times to Nixon.

And with regard to the documents from the agency where they have produced some documents albeit the same documents they produced in Judge Friedman's case and Judge Kessler's case they should have to produce forthwith a privilege log along with the proper

justifications for claims of privilege. But it's too late for the documents inside the task force, they are already in defiance of Your Honor's orders, they have waived objections, they can't raise objections now, it's too late.

THE COURT: Let me ask you this. I have not focused on those other two cases that are before different judges in this court, Judge Friedman and Judge Kessler, at what stage are those cases proceeding now?

MR. KLAYMAN: They are proceeding as a matter of course. I mean in effect those cases have now been merged into Your Honor's case because the Bush-Cheney administration—[27]

THE COURT: I wouldn't go that far.

MR. KLAYMAN: Well effectively, not technically. What they are claiming is that they have reproduced all of the documents in those other cases in the context of this case and there are motions pending in these other cases.

THE COURT: All right, let me ask you this then. In those other cases, and they are not related cases, in those other cases then the government has taken the position that it will not assert privilege but that further intrusion then is indeed unconstitutional, is that the stage those other cases are in?

MR. KLAYMAN: No. You see those are the agencies, these are FOIA cases, Freedom of Information cases. They are taking the position that we've produced everything that we have to produce save for those documents that we can withhold under claim of privilege. But those documents in the other cases don't get into the so-called belly of the beast which is the Cheney Energy Task Force itself centered inside the White House.

THE COURT: For those cases that the government has asserted a privilege, for those [28] documents that the government has asserted a privilege in those other cases has the government submitted those documents for in camera inspection to my colleagues?

MR. KLAYMAN: Not as yet. Various motions are pending in those cases including motions for contempt in those other cases as well. The point that I'm trying to make is you, Your Honor, have a highbred of that case and something unique here which is our seeking documents directly out of the Cheney Energy Task Force, not the agencies that are on the periphery but right out of the Task Force.

THE COURT: I understand. I was just asking just because I was curious.

MR. KLAYMAN: And that is why when Mr. Coffin makes the argument that we have everything that we need at best that is extremely disingenuous because we don't have the core documents about what went on inside the Task Force itself. Consequently their not having objected on September 3rd, or raised any claims of privilege, they've waived any objections or claims of privilege and they have to, no pun unintended, cough up the documents immediately. They are way beyond anything else at this point, any kind of argument. [29]

THE COURT: All right. It that it?

MR. KLAYMAN: That's it. Thank you, Your Honor

THE COURT: All right. Mr. Coffin.

MR. COFFIN: Your Honor, as far as waiver goes the executive privilege—the Supreme Court has made clear that the waiver of executive privilege is not likely inferred and we have in fact our intent to claim that if

necessary in this case. And we, of course, do intent to comply with any orders, final orders, of this court subject to appropriate appellate review.

THE COURT: Sure, sure.

MR. COFFIN: Your Honor, I mean—

THE COURT: Let's just be candid. If the court denies the request for reconsideration, denies the motion for protective order then what is next on this court's agenda, on this court's calendar?

MR. COFFIN: On this court's calendar you would have in front of you agency motions to compel. What the United States would is something that we would have to consider.

THE COURT: All right, that's fine. I just wanted to know. I think that the court should [30] then focus on the motion to compel and there was a reason why I didn't have all of those remaining motions compel, contempt, et cetera, et cetera, et cetera on the court's calendar for today. All right, thank you. Anything further?

MR. KLAYMAN: Your Honor, Mr. Klayman again.

THE COURT: Wait a minute, Mr. Coffin is at the podium, let me hear him.

MR. COFFIN: Your Honor, if you rule today we will have some housekeeping matters.

THE COURT: Let's get the housekeeping matters. Let's assume that I rule today, what are the housekeeping matters?

MR. COFFIN: There are several matters, one minor dealing with the motion to compel.

THE COURT: Well that's not really before me.

MR. COFFIN: No, it's not before the court. Our response is due on Monday and we would ask for a week extra which shouldn't effect your November 13th hearing on that motion.

THE COURT: I don't think that I'd have any problems with that but I'll hear from [31] plaintiffs as well.

MR. COFFIN: The issue of Andrew Lundquist as a defendant in this case is wholly separate from all of these other issues. It's a question of whether he is now a federal government employee. We've produced an affidavit that says he isn't and I'm sure—

THE COURT: And that has not been controverted, has it?

MR. COFFIN: It hasn't been controverted. We want to move to dismiss him from the case. You've told us not to file summary judgment pleadings. I'd at least like to—

THE COURT: Well that's a motion to dismiss though.

MR. COFFIN: And as you said before there is a factual issue of whether he's—

THE COURT: Have you spoken with your opponents about that?

MR. COFFIN: I haven't, I just knew that you had a summary judgment bar in place and so that is an issue.

THE COURT: Maybe that's an issue that we can resolve.

MR. COFFIN: And, Your Honor, the big [32] issue is, you know, if you go the way you saying we would ask orally today for a stay appeal.

THE COURT: All right.

MR. COFFIN: I'll discuss that if you rule.

THE COURT: All right. Mr. Klayman.

MR. KLAYMAN: Yes, Your Honor. There you have it, finally we have gotten a straight response and that's why this whole procedure up until now has simply been an exercise in delay, and that's why, Your Honor, I would urge you to issue an order that they produce the documents of the Task Force forthwith. Thank you.

THE COURT: All right, thank you, counsel. What about Mr. Lundquist, Mr. Klayman?

MR. KLAYMAN: Your Honor, I will certainly take that under advisement. I believe that he is a legitimate defendant. We have thought this through, so has the Sierra Club, but there is no motion pending.

THE COURT: Well sometimes issues can get resolved by agreement of counsel.

MR. KLAYMAN: Well, we'll take a look at it. Right now I'm in trial in Seattle and so as [33] soon as I get back I'll contact Mr. Coffin.

THE COURT: Let me hear from Mr. Coffin and then I'll give you a chance counsel. I'm sorry, you wanted to respond.

MR. COFFIN: I'm not sure what take a look at it means.

THE COURT: Why don't I do this, why don't I just direct counsel to meet and confer? You don't have to do it face to face.

MR. COFFIN: That's fine, we'll do that.

THE COURT: Just meet and confer about that issue, Mr. Klayman.

MR. KLAYMAN: Certainly, Your Honor.

THE COURT: You can talk over the phone about that.

Yes, counsel.

MR. NARAYAN: Just a few things, Your Honor. One is that if the court does proceed as it has indicated that it is going to I think that we'd like to know when the privilege log and privilege documents are going to be produce, and we would suggest a fairly short time frame.

THE COURT: Well the government has indicated that it doesn't intend to comply with the court's order and would seek a stay of the court's [34] order to consider its appellate options. Why shouldn't I—these matters are very important, why shouldn't the court grant a stay and give the government a chance to consider whether it wishes to file a notice of appeal?

MR. NARAYAN: Well, Your Honor, there is a circuit case right on point as to whether an appeal is appropriate here and the answer is that it isn't. In *In Re Executive Office of the President*, which is 215 F. 3rd 20, the Circuit Court specifically held that it doesn't have jurisdiction over an appeal of this nature where there is no claim of privilege and no threat that privileged documents are going to be produced as a result of the court's ruling.

THE COURT: Right, but that's not really an issue that I asked the parties to brief at all. I just wanted to ask the question anyway.

MR. NARAYAN: I guess again we are concerned about delay here and that's why we're asking for some sort of a timeframe as to how this is going to proceed.

THE COURT: All right. I'm going to take about a five or ten minute recess.

(Recess.)

[35]

THE COURT: The government's arguments are not new to the court, there has been nothing new to the court to persuade the court that its ruling in August is erroneous, therefore the court will deny the motion for reconsideration and deny the request for a protective order.

And again I reiterate all I'm requiring the government to do is to produce the non—privileged documents and for those documents that the government believes the privilege attaches to assert the privilege and provide an appropriate privilege log just like everyone else has to do.

Under the circumstances I think that it would be appropriate for the court to direct the government to produce the non-privileged information again by no later than two weeks from today, that's the 31st, and also to provide an appropriate privilege log by that date. The government has indicated that it would like a period of time in which to seek a stay of the court's ruling and I think that given an indication of how the government plans to proceed then I think that it is appropriate for the government to file a written motion for a stay and a shorter period of time. Since this is probably [36] not just a new consideration of the government I don't think that requiring the government to file its motion for stay by say noon on Monday the 21st

is unreasonable. And then I'll give the plaintiffs essentially three days, the 24th noon, that's eastern time, to file a response and any reply by the government should be filed by the 25th of October by noon. I'll schedule a hearing on the government's request for a stay on the 29th of October. Even though I'll be in trial I'll—I'll deal with that. The 29th of October at 10:00 for a hearing on the government's motion for a stay.

MR. KLAYMAN: Your Honor, Mr. Klayman.

THE COURT: Yes.

MR. KLAYMAN: I may be out of town that day. Is it possible to do it on the 30th or the 31st?

THE COURT: Well I've given the government until the 31st to comply with my order. I could do it the 30th I assume. You can participate by phone if you want.

MR. KLAYMAN: I may actually be in transit. If it is possible, if not I'll live with it.

THE COURT: No, no. I mean I'm going to [37] be in trial so let me just see what else I have.

MR. COFFIN: Your Honor.

THE COURT: Just a second. Is that a bad day for you?

MR. COFFIN: No, I'm concerned about the two days.

THE COURT: How much time do you need?

MR. COFFIN: Well it's the two days before the hearing and compliance.

THE COURT: I mean this is something that the government has been considering, isn't it?

MR. COFFIN: The briefing is not problem, it's the two days at the tail end. If you were to deny our motion to stay we would have two days to go to the Court of Appeals and get an emergency stay if necessary.

THE COURT: I wouldn't make anyone speed up to the Court of Appeals. Believe me if I deny it I'll do something that is going to accommodate not only the attorneys before me but also my colleagues in the circuit.

MR. COFFIN: Well given the schedule does it make sense then to set a 31st date for compliance with the order, that's my question, since either way—[37]

THE COURT: Well I can shorten the period of time. I want to give you more time to file a motion for a stay. I mean you can file it tomorrow, can't you? Do you have a copy with you today?

MR. COFFIN: No, I don't. I mean in part it depends on what you do so we don't have papers ready right now.

THE COURT: All right.

I mean what is fair? No one is going to have to run up to the Court of Appeals, I'm not going to do it to you, I'm not going to do it to my colleagues in the circuit. What were you suggesting? You said the 31st might—what are you suggesting, maybe another day or two, say the 5th for production of documents.

MR. COFFIN: Well that would give us enough time to—it would still be an emergency but we'd have more time to go to the Court of Appeals if necessary.

THE COURT: All right. That's fine. I can give the government until the 5th of November.

MR. COFFIN: Let me explain. Given our position in this litigation we have not done a document review of the Office of Vice President.

[39]

THE COURT: Well how do you know that privilege attaches then?

MR. COFFIN: Well we've done an initial review.

THE COURT: Wait a minute, wait a minute. That's a startling revelation, Mr. Coffin. You've not done—

MR. COFFIN: Your Honor—

THE COURT: No, counsel.

MR. COFFIN: I'm trying to finish sentence.

THE COURT: Will you let me finish my sentence, sir?

MR. COFFIN: I well.

THE COURT: You're a gifted lawyer as are the other lawyers but please don't interrupt me.

That is a startling revelation, that the government has not made a document review.

MR. COFFIN: Oh, no, no. I overstated my case.

THE COURT: Overstated. You're telling me that you haven't looked, how do you know—

MR. COFFIN: We haven't completed a document review of the Office of the Vice President. We certainly have done enough to [40] satisfy ourselves that the reasons for our argument attached.

THE COURT: The government is making these arguments in good faith?

MR. COFFIN: Oh, absolutely, Your Honor.

MR. KLAYMAN: Your Honor, the language of my opponent speaks for itself.

THE COURT: Wait a minute, one at a time.

MR. KLAYMAN: It's Mr. Klayman, I mean he made a plain statement, obviously he's backing off because it is bad press, but he made the statement that he made.

THE COURT: I'm not going to lose control. Go ahead Mr. Coffin. Mr. Klayman, you'll get your chance.

MR. COFFIN: Your Honor, we haven't completed the document review. We are aware that there are a number—

THE COURT: That's completely different from what you said originally.

MR. COFFIN: You're right, you're right, I'm sorry, I misspoke.

THE COURT: But you—

MR. COFFIN: I misspoke, Your Honor.

THE COURT: How could you misspeak about [41] something as important as that?

MR. COFFIN: By opening my mouth, it happens, Your Honor.

THE COURT: But counsel you're an officer of the court and I listen very carefully.

MR. COFFIN: We have not completed our document review and I'm concerned that two weeks may not be enough time, but having said that, Your Honor, the fact is we are going to—

THE COURT: I think at the very least the government had an obligation to at least complete the

document review. Certainly you've had than enough time. This case has been pending.

MR. COFFIN: Your Honor, may I speak, please?

Our point, Your Honor, has been that compliance with the order of the court imposes a burden on the Office of the Vice President. That is a real burden. If we had completed and done everything that Your Honor has asked us to do today that burden would be gone, but it would have been realized. So, the necessary part of our argument dealing with burden is that we're not going to ask our clients to complete that review. I mean that's the logical following from our argument. I know [42] that you've rejected it, Your Honor, but that is what we have been arguing.

THE COURT: Why is the court learning for the first time that the government has even completed a document review?

MR. COFFIN: Your Honor, we have argued to you that the burden of doing a document production is an unconstitutional burden.

THE COURT: That's completely different. Document production as opposed to document review, to review the documents to see whether or not privilege attaches or not. I'm differentiating there—

MR. COFFIN: I understand.

THE COURT: —between document review and document production.

MR. COFFIN: I understand.

THE COURT: You haven't done a document review.

MR. COFFIN: Your Honor, that perhaps is where I misspoke but we have done—

THE COURT: You say perhaps?

MR. COFFIN: Your Honor, please.

THE COURT: He's trying to find out whether you've completed—

[43]

MR. COFFIN: We have done a review.

THE COURT: All right.

MR. COFFIN: We have done a review, we haven't completed it, we haven't done everything necessary for a production. That's my point and I apologize for misspeaking, Your Honor.

THE COURT: You said it in your papers though. I understand your arguing your papers, document production would be unnecessary. You never said that even completing a review would be onerous, you never said that.

MR. COFFIN: Your Honor, that's part of the production. But we have—

THE COURT: Don't parties have to review documents before they can determine whether or not privilege even attaches?

MR. COFFIN: Your Honor, we have done that, we are satisfied with that.

THE COURT: All right. Now, what's onerous now, you only have two weeks to comply?

MR. COFFIN: No, Your Honor. I mean if after you issue a ruling on the stay, you're willing to revisit the date to give us time for a Court of Appeals ruling.

THE COURT: I'm going to be fair to the [44] government. I'm going to be fair to anyone appears

before me. I'm not going to require anyone to get on the elevator and run up to the fifth floor. I'm not going to do that.

MR. COFFIN: Okay, Your Honor.

THE COURT: I'll treat you fairly just like I would with anyone else. Any response to counsel's statements? Mr. Klayman.

MR. KLAYMAN: It's just that the statement of Mr. Coffin speaks for itself, it's a demonstration of the bad faith in this case.

THE COURT: All right. I gave the government until Monday to file its motion for a stay and that's by noon, and the plaintiffs until the 24th I believe I said. There is some flexibility, Mr. Coffin, not a lot but there is some flexibility. You've suggested the 5th of November for the date to comply with the court's order, is that correct, and a hearing in the preceding week to address the issue of a stay. Mr. Klayman, you said that you would be out of town the 30th. The 29th is fine or actually we can do it the 31st. If you want to do it the 31st that's fine with me.

[45]

MR. KLAYMAN: That's fine, Your Honor.

THE COURT: All right at—let me make sure that I don't have any motions hearings.

MR. KLAYMAN: I believe I have something at 10:00 a.m. so if we could do it in the afternoon.

THE COURT: I don't really have any problems with that, we'll do it at 1:00 in courtroom, it will be a hearing on the motion for a stay.

MR. COFFIN: Your Honor, I won't be here.

THE COURT: Well I'll accommodate you too now.

MR. COFFIN: I've got another major hearing on the 31st.

THE COURT: I mean you're the government's attorney, you've been arguing these. If you want the hearing on the 30th I'll give you a hearing on the 30th.

MR. COFFIN: Your Honor, I'm sorry. I'm arguing a case in front of Judge Bates that is of major significance.

THE COURT: It's more important than this case?

MR. COFFIN: No, sir. That's on the 31st [46] and to prepare for that I can't see doing two hearings in two days. I would prefer actually—

THE COURT: All right. I was more than willing to accommodate you.

MR. COFFIN: I appreciate that.

THE COURT: So the government will be represented on the 31st and that will be at 1:00.

Anything further, counsel? I'll issue an appropriate written order that essentially just memorializes my ruling on the denial of the request for a stay.

MR. KLAYMAN: No, Your Honor, thank you. Larry Klayman.

THE COURT: And the denial of a request for a protective order. I may not get that order issued today.

MR. COFFIN: Your Honor, I need a seven day extension on the motion to compel, our motion to compel response is due on Monday and we would ask for a seven day extension.

THE COURT: Any problems with that anyone?

MR. KLAYMAN: I didn't hear it, Your Honor.

THE COURT Mr. Coffin asked for a seven day extension on his motion to compel and there are [47] no objections by your co-counsel. I assume you have no objections having made requests for extension of time yourself.

MR. COFFIN: No.

THE COURT: All right. Mr. Coffin, I'd just ask that you submit to my chambers an appropriate order. You can e-mail it to chambers.

Anything further?

MR. NARAYAN: No, Your Honor, thank you.

THE COURT: Thank you very much. No one has to stand, thank you.

(Proceedings concluded at 11:20 a.m.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 01-1530 (EGS)

JUDICIAL WATCH, INC., PLAINTIFF

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP, ET AL., DEFENDANTS

C.A. No. 02-631 (EGS)

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, IN HIS OFFICIAL CAPACITY, ET AL., DEFENDANTS

DEFENDANTS' AMENDED MOTION FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 1292(b) AND FOR EXPEDITED CONSIDERATION OF THIS MOTION

Defendants Vice President Richard B. Cheney, the National Energy Policy Development Group ("NEPDG"), Andrew Lundquist, Joshua Bolten, and Larry Lindsey respectfully request this Court to certify for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), (1) its order of October 17, 2002 denying the government's motion for reconsideration and for a protective order; (2) its order of September 9, 2002, authorizing discovery and denying the government permission to file a motion for summary judgment; and

(3) its order of July 11, 2002, holding that FACA may be enforceable against the Vice President through the federal mandamus statute. The reasons for granting this motion are stated in the accompanying memorandum.

Defendants also request that this Court expedite briefing and consideration of this motion, so that it may be considered by this Court at its October 31, 2002 hearing, along with Defendants' motion for stay pending appeal. If necessary to accommodate this request, Defendants will waive any right to file a reply brief.

Counsel for the Defendants have conferred with plaintiffs' counsel regarding their request to expedite the consideration of this motion. Based on a miscommunication about the scope of Defendants' motion for interlocutory appeal, Sierra Club originally consented to expedited consideration of this motion. However, on review of the motion, Sierra Club requests that the Court pursue a normal briefing schedule. Judicial Watch opposes the expedited consideration of this motion.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 01-1530 (EGS)

JUDICIAL WATCH, INC., PLAINTIFF

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP, ET AL., DEFENDANTS

C.A. No. 02-631 (EGS)

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, IN HIS OFFICIAL CAPACITY, ET AL., DEFENDANTS

DEFENDANTS' RESPONSE TO ORDER OF OCTOBER 28

In response to the Court's Order of October 28 regarding the status of the production of documents by the November 5, 2002 deadline, defendants state the following:

1. Defendants have thus far identified 24 boxes of materials as potentially responsive to plaintiffs' discovery requests.[1] Those boxes have been reviewed for

[1] The documents in these 24 boxes had been previously identified, set aside, and preliminary reviewed after service of plaintiffs' discovery but were not processed for release for the reasons stated in defendants' motion for a protective order.

responsiveness. The documents identified as likely to be responsive from those boxes have been copied and bates-stamped. These documents are contained in approximately twelve boxes. Defendants are currently reviewing those boxes for privilege and are preparing privilege logs. Many of the documents contained in those boxes are single pages, requiring individual review and accounting of each page. As of this filing, approximately ten boxes remain for final review. Defendants are continuing to search for responsive documents and other documents may be added to this estimate.

2. In addition to hard copy documents, defendants are reviewing a quantity of approximately 10,000 emails retrieved from the email archive system. Because the retrieval system employs key words, not all of the emails identified by the search are responsive, requiring defendants to review each email individually. Defendants expect to complete this process within the next several days. Once the responsive emails have been identified, they must be printed, copied, and bates-stamped. Defendants expect that this portion of the email processing will not be completed until the end of this week. Once completed, the copies can then be reviewed and privilege logs prepared as appropriate. The total number of responsive emails is not yet known, but is likely to be several thousand. Because many of the emails consist of one or two pages, the review and logging process will be time intensive.

3. Defendants are devoting substantial resources to this effort. Thus, far eight attorneys are participating in the review process, and defendants expect to assign additional attorneys to the process. Defendants have also employed a contractor to provide high speed copy-

ing services, and to bates-stamp the hard copies. The contractor is also providing technical support in the processing of the emails. Based upon the review thus far, each existing box requires one to two attorney days to review and prepare a rough privilege log. Following that review, privilege logs must be finalized. Further, once the responsive emails are identified, printed, and numbered, defendants expect that the privilege review and logging process to be equally, if not more, time-consuming, due to the expected quantity of individual emails.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 01-CV-15309

JUDICIAL WATCH, INC., PLAINTIFF

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP,
DEFENDANT

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

Washington, D.C.
Oct. 31, 2002

APPEARANCES:

For Plaintiff Judicial Watch:

LARRY KLAYMAN, ESQ.

For Plaintiff Sierra Club:

DAVID BOOKBINDER, ESQ.
ROGER ADELMAN, ESQ.
* SANJAY NARAYAN, ESQ.
* ALEX LEVINSON, ESQ.

For the Defendant:

SHANNEN W. COFFIN, ESQ.
CRAIG BLACKWELL, ESQ.
THOMAS MILLET, ESQ.

* Appearing by telephone.

PROCEEDINGS

[2]

THE DEPUTY CLERK: Civil Action 01-1530, Judicial Watch versus National Energy Policy Development Group. Will counsel please stand and identify yourselves.

MR. KLAYMAN: Larry Klayman for Judicial Watch.

THE COURT: Mr. Klayman.

MR. BOOKBINDER: David Bookbinder for Sierra Club.

MR. ADELMAN: Roger Adelman, local counsel for the Sierra Club.

MR. COFFIN: Shannen Coffin for the United States with Craig Blackwell and Tom Millet.

THE COURT: Good afternoon, Counsel. I just need to get a clarification first from the government. On the one hand, the government has filed a motion for a stay of the Court's orders pending appeal, and alternatively, if I understand your submissions correctly, the government has also requested additional time within which to complete its document search in preparation of a privilege log. I always thought it was the government's intent to not comply with the Court's orders so I need some clarification.

MR. COFFIN: They're alternative relief. If you were to give us the stay, Your Honor, I don't think we need to address the due date because the issue would be joined in the Court of Appeals. If you don't give us the stay, we would then go to the Court of Appeals to seek a stay. Having said that, [3] if we weren't to get a stay from this court, we would simply want some more time

from the November 5 deadline in the absence of a stay to complete the review.

THE COURT: That's where I'm confused, because I never thought it was the government's intent to comply with the Court's order. I guess I don't understand your request for additional time within which to complete your review of documents and then to prepare and file your privilege log if you don't intend to comply with the Court's order. I just don't understand that.

MR. COFFIN: I don't think that's—let me say this. There's always the option to go into contempt. We haven't made a decision that we're going to go into contempt, so we'd like to be able to try to comply with the order if we don't have a stay from this court or—

THE COURT: All right. I just wanted a clarification. So if I deny the request for a stay, the government is asking for additional time to complete its review of documents in preparation of its privilege log ostensibly in an effort to comply with the Court's order, is that correct?

MR. COFFIN: In absence of the stay, yes, Your Honor.

THE COURT: So in the absence of a stay, the government intends to comply with our orders then, is that correct?

MR. COFFIN: If we don't get a Court of Appeals stay, [4] I don't know what choice we have except for contempt.

THE COURT: Okay.

MR. COFFIN: I suppose that's an option, but we certainly haven't made a decision that we're not going to comply with your orders, Your Honor.

THE COURT: But you haven't complied with the orders, though, up to this point.

MR. COFFIN: Well, Your Honor, we've had a protective order motion in, and our reading of the civil rules of procedure is that that stays the obligation to respond to discovery. So it's simply we haven't complied yet because of the protective order motion. Now that you have ruled, we would seek appeal of that ruling, but if we're unsuccessful—

THE COURT: I haven't ordered the government to release any privileged documents at all. I haven't done that at all. All I said was comply with the order; if there are privileged documents, tell me what the documents are without prejudicing yourself.

You can tell me what the documents are in an appropriate privilege log, and I'll determine whether privilege is properly asserted or not. It's not as if I've ordered the government to turn over all the documents that the government contends are privileged. Indeed, the government told me last year it hadn't even completed its review of all the documents. That process is now in place though, is that correct, review of the [5] documents?

MR. COFFIN: Yes, sir, Your Honor. Can I step back to what happened at the last hearing? Because I just want to say that it was not clear from what I said, and I want to make clear that we certainly did enough to satisfy ourselves of the merits of our constitutional arguments. The boxes that we've had set aside have been set aside for quite some time. I do apologize to the Court for the confusion. But we had done enough to satisfy ourselves of the merits of that argument, but we certainly hadn't done the privilege log and the Bates

numbers and all the stuff that goes with a document production.

THE COURT: All right.

MR. COFFIN: But let me—

THE COURT: If I'm inclined to grant the government additional time to complete its review of the documents, how much time do you need?

MR. COFFIN: Well, Mr. Bookbinder and I have been speaking about that. I haven't spoken to Mr. Klayman this morning.

THE COURT: I'll hear from both of those gentlemen. My reading of their responses—I understand from their responses to my order was that Sierra Club has no objection to a reasonable period of time. Judicial Watch does have an objection.

[6]

MR. COFFIN: That's right. And what I've spoken to Sierra Club about, and at least we've come to an agreement, is that I believe three weeks from tomorrow would be the date?

MR. BOOKBINDER: The 23rd. I don't know where that fits.

THE COURT: What is today, the 31st?

MR. COFFIN: Today is the 31st, Your Honor.

THE COURT: Three weeks from tomorrow to complete your review and to do what?

MR. BOOKBINDER: Excuse me, Your Honor. The 22nd is a Friday. My apologies.

MR. COFFIN: Sorry. The 22nd. That makes sense.

THE COURT: The 22nd.

MR. COFFIN: This is what we would foresee going on here. We would be moving towards complying with your order, but we would also be seeing, if you were to deny the stay, we would be seeking to get a stay in the Court of Appeals. And that's sort of the—

THE COURT: All right, I understand. I think I understand what you're saying. All right. So if deny your request for a stay, then you will proceed—you're making representations you'll proceed with your documents search in an effort to comply with the Court's order, nevertheless availing yourself of your right to seek your stay in the Court of Appeals.

[7]

MR. COFFIN: That's correct.

THE COURT: And this is all separate and apart from the motion filed by the government for interlocutory appeal, which putting that aside for the time being, it's probably going to be moot. Let's assume I deny the request for a stay, which I probably will do, but I'll also —and I want to hear from other counsel as well—I'll probably grant your request for additional time. I'll probably do that based on your representations that you're reviewing in an effort to prepare a privilege log.

And by the same token, you're seeking a stay in the Court of Appeals, so you'll have some time. Even if I were to deny the motion for interlocutory appeal next week, you certainly have time between now and the compliance date to seek whatever you want to seek from the circuit. And our courts of appeal have said on many, many occasions, the prospect of proceeding with contempt in cases like this should be avoided, and I certainly have no intent to proceed along those lines.

So that's probably going to be a moot issue, interlocutory appeal probably, assuming I deny—the request for a stay, which I will probably do. I'll give you the time to comply with my order, and then you're free to seek whatever relief you want from the circuit then, correct?

MR. COFFIN: Your Honor, I'm hoping I have a chance to convince you to grant our stay, but if you were to deny the [8] stay—

THE COURT: Well, go ahead. I'll give you a few minutes. I've read your pleadings; I'm obviously very familiar with your pleadings, but if there's some principal point or points you wish to make in an effort to persuade me to grant your request for a stay, be my guest.

MR. COFFIN: Okay. Well, let's talk for a minute about the seriousness of the issues. I think that the legal issues involved in this case, I recognize that Your Honor has disagreed with us on these, but I don't think you've ever said that they're frivolous legal issues. As a matter of fact, at the last hearing you called these important legal issues.

THE COURT: It's an important case.

MR. COFFIN: I agree, and I think as a result, the issues that we present and we intend to appeal are certainly important and serious issues. So I think that first part of the stay standard, so the question then becomes about harm.

THE COURT: Now, that's an issue I want you to focus on, irreparable harm. It's not as if I've abused my authority and said to the government, turn over those documents, I don't care if they're privileged or not, turn them over right now and I'm not going to stay my

order. You could make a very compelling argument for irreparable harm under those [9] circumstances.

All I've said, though, consistent with precedent of law standing is to produce the nonprivileged documents, and indeed if there are privileged documents, prepare and file your privilege log. Indeed, I've said prepare and file it under seal for my eyes only or for the eyes only for a magistrate judge. But I wouldn't delegate; I would do it myself so that an independent determination can be made as to whether or not privilege can be properly invoked.

So I've not told the government to turn over privileged documents without any protection whatsoever, which would indeed be irreparable harm. The harm as I understand your argument to be, though, is the intrusion by the Court of requiring the government to even assert its privilege and to prepare a privilege log. That's an intrusion that I believe the government is of the opinion is unconstitutional.

MR. COFFIN: In the absence of a showing of compelling need.

THE COURT: And that's the irreparable harm then.

MR. COFFIN: Well, the irreparable harm would be if you accept our argument, which I know you haven't, but if you accept our argument that there is a constitutional harm in the absence of a showing of need to require us to submit to discovery under these circumstances, if we go up on appeal and don't have a stay, we've lost. I mean, we've lost our argument. We don't have an argument. You've effectively [10] mooted our argument because we'll have to comply with your order.

THE COURT: So then you're conceding then that you have no direct right to appeal then.

MR. COFFIN: Oh, no.

THE COURT: I'm sorry. We have some static coming from the telephone. Let's just see what's going on. Hello? Someone dialed in. Hello, Counsel.

MR. NARAYAN: Yes. I hear you, Your Honor.

THE COURT: Let's just get your names. How are you today?

MR. NARAYAN: Just fine, thank you. This is Sanjay Narayan and Alex Levinson with the Sierra Club.

THE COURT: All right. Good afternoon, Counsel.

MR. COFFIN: Your Honor, your question was whether I was conceding that we didn't have a right to appeal. No, not at all, but if we appeal in the absence of a stay, then we're going to have to comply with your order because it's a discovery order.

THE COURT: If I don't grant you a stay and I extend the time for compliance of my order to November 22 or 23, you certainly have time within which to request a stay from the circuit down here.

MR. COFFIN: Well, yes, we do.

THE COURT: Then you haven't lost your argument then, [11] have you?

MR. COFFIN: In that sense no, but why would this court require the Court of Appeals to make that determination when it's teed up for you to make? I'm not quite sure—I mean, it's the same argument we'd be making to the Court of Appeals.

THE COURT: Exactly, and often times—

MR. COFFIN: If the Court of Appeals would grant the stay, then that means that this court should grant the stay. And the only way we—

THE COURT: I guess the point I'm making, Counsel, I'm not foreclosing the Court of Appeals from granting you whatever relief the Court of Appeals wants to grant you; I'm just saying our rules require that you make the request for a stay in this court in the first instance, and there's times when district judges for reasons, various reasons, maybe a district court's view as a matter of law that the basis for a stay has not been persuasive, deny the request for a stay, which doesn't preclude a litigant from seeking relief in the circuit court.

And you certainly aren't laboring under any significant time constraints, because my order for compliance would be the 23rd or 22nd or whatever date is agreeable to the parties. You could in your leisure seek a stay from the circuit. So you're not without your remedy, don't you agree?

[12]

MR. COFFIN: I have to disagree in the sense that the issue—we would certainly have time to go to the Court of Appeals, but I don't think that's the issue. The issue that is before this court is whether denying a stay would effectively harm us.

THE COURT: Nothing's going to happen to you and your clients. This is not a scenario—I mean, I could envision a scenario that you're complaining of that doesn't exist, and that would be that the due date is tomorrow and the judge says I'm not extending this date and the government has to comply by tomorrow

and I'm denying your request for a stay. Then you're off to the circuit court, right?

MR. COFFIN: Yes.

THE COURT: All right. That's not the scenario that I'm talking about. I may be well inclined—in fact, I am inclined to grant you a stay based on your good faith representations that you want to continue with your search and that you want to prepare a privilege log. That's fine.

MR. COFFIN: You mean an extension, Your Honor.

THE COURT: Yes, an extension, I'm sorry. Thank you for correcting me. I'm inclined to grant your request for extension of time and then deny the request for a stay because I don't believe the standards for a stay are persuasive as a matter of fact or law, and that doesn't foreclose you from seeking your remedy in the circuit court unless I disagree with [13] you.

And then you say, Judge, then we're without a remedy then because then we have to comply with the order. You don't immediately have to turn over anything. You have three weeks within which to seek expedited consideration—well, you're a lawyer. I shouldn't tell you what those remedies are; you know what those remedies are.

MR. COFFIN: But Your Honor, the question here is not whether—it's not whether we could get a stay from the Court of Appeals. That would mean you would never have to grant a stay in any case.

THE COURT: Oh, no. We're not arbitrary, no. I mean I look at the—I mean I measure each request for a stay against precedent, *Holiday Tours* test is indeed the fountainhead case for determining whether or not a

basis exists for a stay; similar, if not identical to the standards for extraordinary legal relief in the forms of TROs and preliminary injunctions, and there are times when I will deny a stay and the Court of Appeals will grant a stay.

That's the way the process works. It may well be that I could deny a stay in this case and the Court of Appeals will grant it, but nothing onerous is going to happen to your client between now and the Court of Appeals—

MR. COFFIN: Let's just assume that the 22nd was the deadline here. I find it hard to believe that the Court of [14] Appeals would issue us final relief so that a stay would have to be granted by the Court of Appeals or by this court prior to the 22nd. So the question is really whether—the question before this court in the legal analysis is whether we need a stay to secure effective appeal, and we do, because there's no way before the 22nd that we're going to get our relief so that we'd have to by the 22nd comply with the order.

THE COURT: It's conceivable that the Court of Appeals may differ from this court's view about the need for a stay. If the Court of Appeals is of the opinion that a stay is appropriate, then certainly the Court of Appeals will—well, I can't speak for the Court of Appeals. It's very conceivable that the Court of Appeals would grant a stay before the compliance date.

MR. COFFIN: We believe that it will, because we think that we meet the standard for a stay here. With all due respect, I think there's—I think that there's a sense of abdication about that part of the standard here, because this court has to determine whether or not there's injury to the government. There would be an

injury to our argument in the absence of a stay if we had to comply with the order of this court pending an appeal.

THE COURT: All right. And the injury is the search process and the preparation of the log or turning over the documents?

[15]

MR. COFFIN: It's the entire process. It's both.

THE COURT: So that's the government's position, it's being injured then?

MR. COFFIN: We believe we are, but we're doing so out of good faith in order to comply.

THE COURT: And I appreciate that. I appreciate that. I think that's how the three branches of government should coexist. You disagree with the order you're complying with, and I appreciate that. And I think it's appropriate that the order is being complied with, and I'm most inclined to grant you additional time within which to continue to comply with the order. I understand what you're saying. I disagree with you as to whether or not as a matter of fact and law there is injury, a constitutional injury or an injury of the magnitude that you speak of. I would agree with you completely if I were to abuse my authority and say I don't care if these documents are privileged, turn them over, and if you don't, let the chips fall where they may. But I would never do that. I would never knowingly abuse my authority.

MR. COFFIN: But that's a matter of degree. Your Honor. It's not a matter of us showing irreparable harm. I mean—

THE COURT: No, I understand your argument.

MR. COFFIN: Okay. Well, there's an important point [16] I wanted to make about—

THE COURT: I thought that was the most important point.

MR. COFFIN: Well, there's harm to the plaintiffs as well.

THE COURT: All right. And the public interest. Don't forget that, now.

MR. COFFIN: The important point is that their argument is delay, that there's been a lot of delay and there's going to be more delay if you give a stay. Let me suggest, however, and this may require a little bit of explication, that there's not really a delay if in fact an appeal goes forward and we lose the appeal and then we have to comply with this court's order. Because if we do get to the point where we assert privilege in a privilege log, that's going to require a showing of need.

I think the only difference that this court has had with the U.S.'s position has been a matter of timing, and I understand you believe that to be a very serious difference. But there's no question that if we assert privilege, the presumption of the privilege arises and the plaintiffs will then have to show need, which means they have to show in part under the *Dellen* standard and under the *Emory Seal* case standard that the lack of availability of these documents from other sources, which means that the other discovery in this [17] case has to go forward and will be going forward.

So I don't really think that there's going to be—those resources have to be exhausted by plaintiffs before you can even get to the privilege issue. So I really don't think that they're really—I mean, they can talk about theoretical delay here, but in practical terms,

I don't think there's going to be much of a delay. So Your Honor, that's our position.

THE COURT: Let me hear from you with respect to the motion that's not before the Court, and that's the motion for the request for certification for interlocutory appeal purposes. Your motion's been filed. My recollection is responses have not been filed. I didn't put in place a briefing schedule. I should put that in place.

MR. COFFIN: I think their responses are due on Monday under the current schedule, but my colleague is going to want some more time. We've talked about it.

THE COURT: All right. Then I'll hear from plaintiffs in that regard, and I'll give you a chance to be heard again. Mr. Klayman?

MR. KLAYMAN: Your Honor, I think it's important because I'm going to ask Your Honor to set some times here, if Your Honor will grant my request, is to understand the context of this case. We sometimes lose sight of that. As lawyers before this court, we try to remain civil. We certainly have tried. My co-counsel and Your Honor's handled this in a very [18] admirable and gentlemanly way.

THE COURT: Everyone's been a gentleman before the Court. Everyone's been a gentleman and a lady before the Court. I invite zealous advocacy, so everyone's been most civil.

MR. KLAYMAN: Unfortunately, we have to look at the facts of what's gone on at this point in time. We're now well over a year into the case. The government has known all along, and when I say the government, this administration has known all along what it was going to do. They're big boys; we've seen it in many other cases.

They've known that they were going to try to take this appeal, if Your Honor grants it, in an interlocutory matter by certification, or they'll try a writ of mandamus. They'll take this issue to the appellate court, it will sit there for six to eight months at a minimum, it will come back, nothing will happen in the interim. If indeed we win, and we're confident we will win, then we'll just be starting out in the first round of discovery, which is simply finding out what the constitutionality was of this task force.

Once we complete that and Your Honor makes a ruling, they'll try to delay as long as possible. They'll try to take that up on appeal. When Your Honor rules that we should proceed beyond that point, if Your Honor does rule that, we'll be well beyond this administration, a tried and tested [19] technique which is used in many different cases. We've seen it in all of our different cases. That's why it's important to understand where we are.

Number one, Your Honor, they're already in a contempt situation. Your Honor issued orders of August 3 which required them to produce documents or object, and they defied that. We're in a contempt situation because it's now quite clear that they didn't even review documents. In fact, we're in a contempt/bad faith situation because they didn't even start their review, it's apparent from their affidavits and their pleadings, until after the last hearing. They have not been in good faith with this court.

And last but not least, Your Honor, and I don't say this lightly, we have filed a supplementary motion for contempt for an order to show cause. I have been personally threatened through intermediaries. I'm prepared to provide the names of the people who provided

that information; one a high-level informant who works with a government enforcement agency; another, someone well respected in town; statements made to the columnist, Robert Novak: What are we going to do about this Larry Klayman?

THE COURT: That's a collateral matter. I really don't want to get sidetracked on a collateral matter, but you know—

[20]

MR. KLAYMAN: Well, Your Honor -

THE COURT: Let me say one thing. It's important to you. You've made serious allegations, they're important to you, they're serious to you, and because of the severity of the allegations, I should probably refer those matters to the U.S. Attorney's Office, Roscoe Howard's office, and let him sort it out.

MR. KLAYMAN: Well, I think you should do both, Your Honor.

THE COURT: I have enough on my plate.

MR. KLAYMAN: The problem is, that is the Justice Department. You can pretty much figure out what the results are going to be.

THE COURT: He's an outstanding prosecutor, though.

MR. KLAYMAN: I would ask that you do both, and I would ask—and what those allegations are, as you may remember, is not just what are we going to do about Larry Klayman, and that was a Justice Department official to Robert Novak—

THE COURT: You're in fear of your safety, are you?

MR. KLAYMAN: I could be. I could be.

THE COURT: I'd just as soon refer that whole matter, Mr. Klayman, to the attention of the United States Attorney for the District of Columbia for whatever consideration his office wishes to give it. And that would not be the first time that I've referred serious matters that litigants before me take [21] very seriously. And because they take them very seriously, so do I.

But I don't have the resources of the prosecutor's office. I don't have investigators. I have two overworked law clerks, brilliant as they are. I just don't have the resources to get involved in investigating something of that magnitude as Mr. Howard does. I'd keep it here for the record, but I'd want to give them first opportunity to—

MR. KLAYMAN: Well, we recommended that Your Honor do both, so we'd welcome a referral, recognizing that that is the Justice Department, and 99.9 percent of the time—and I'm a former Justice Department prosecutor, proud to have been one at a different time -

THE COURT: Is that right?

MR. KLAYMAN: I am. I was with the Antitrust Division. I did civil and criminal. But the reality is, is that you know what happens when the Justice Department investigates itself. It's what happens when any entity investigates itself.

THE COURT: Well, if I thought that it would be a useless effort, I wouldn't do it. I have the highest regard for Mr. Howard.

MR. KLAYMAN: If you supervise it, Your Honor, I'll take your word for it.

THE COURT: Well, see again there's a fine line [22] between my job and the executive branch's job, and I would never attempt to supervise or oversee a criminal prosecution. I'd be happy to write a letter, and I will do so today, referring—and I'll attach copies of your motions—referring those matters to the attention of the U.S. Attorney's Office for whatever consideration that office wishes to give. If I get a letter back from Mr. Howard in 90 days saying, Judge, we don't plan on taking any action, then I'll take whatever further action is necessary.

MR. KLAYMAN: We're prepared to give you hard evidence.

THE COURT: All right. Save it for Mr. Howard.

MR. KLAYMAN: Let's see how they react.

THE COURT: That's fine. I think it's only fair to do so because I just don't have the resources.

MR. KLAYMAN: We had gone through this before with Judge Lamberth where he in fact supervised the Independent Counsel and the Justice Department with regard to Filegate matters and Chinagate matters, and he was calling them in for briefing sessions. In fact, we have a status conference in a week or so which will relate to some of those matters.

THE COURT: Maybe I should refer this matter to Judge Lamberth then.

MR. KLAYMAN: That would be fine.

THE COURT: Do you think he would agree to—

[23]

MR. KLAYMAN: I think you're both a lot alike. I respect and admire both of you.

THE COURT: Thank you very much. I have the highest regard for my colleague, but he's got enough on his plate as well.

MR. KLAYMAN: But it is a serious matter.

THE COURT: It is. You've made serious allegations. I don't take any allegations lightly, especially that an officer of the Court makes. I'm just being candid with you, Counsel. I just don't have the resources to delve into issues of that magnitude. Mr. Howard has an army of lawyers over there, and it's an outstanding U.S. Attorney's Office. And if I make the referral for whatever consideration, I'm sure they will not take lightly your allegations. I can't promise what the end result will be, but they're not going to take lightly a referral.

MR. KLAYMAN: As Your Honor says, let's see what happens, and we can take it up after, I would ask, 60 to 90 days.

THE COURT: Well, I'm not going to tell Mr. Howard —I'm not going to tie his hands for 60 to 90 days. He's a professional. He'll treat it in a professional manner. Let me ask you something.

MR. KLAYMAN: The point I'm making—

THE COURT: Let me ask you something, though. I want to get back to request for a stay. I know you oppose their pleadings. I know you oppose it. I'm inclined to grant the request for additional time because the government is, in my view, in good faith complying with my order.

They're reviewing the documents, they're preparing a privilege log, and I think it would be an abuse of my authority to say to the government under those circumstances, no, I'm not going to give you a date. That

would not be the correct decision to make. So I'm inclined to do that.

Do you agree or disagree, though, with Mr. Coffin when he says if I give the government additional time within which to ostensibly comply but nevertheless deny the request for a stay that indeed their appellate possibilities are foreclosed? Do you agree with that?

MR. KLAYMAN: No, I don't agree with it. They don't have any appellate possibilities. This is a discovery issue, and there's none to begin with, and all they're trying to do is run out the clock. And as I've said, Your Honor, we've seen it before. I can assure you if you were to order them to produce internal documentation as to when they made the decision to pursue this strategy, you would find out—

THE COURT: I'm not going to do that.

MR. KLAYMAN: —you would find out that it was well over six months to a year ago that they knew exactly what they were going to do. They've succeeded. They've won. They've [25] gotten beyond these elections, and they'll get beyond the next elections too. And that's not our concern.

But even of the meager documents that we have so far—some are produced through the FOIA process —one sticks in my mind, and this is what they're scared about: a letter from the Chevron Corporation to the administration saying let's end the embargo on doing business with Libya, a state on the terrorist watch list before 9/11. There's stuff like that out there, and that's why they're running out the clock.

It's not just a question of energy policy; it's a question of national security in terms of how they're perceived to react to our national security, not anything

that's classified, but to simply how this administration has allowed energy policy to conflict with its war against terrorism. That's what they're concerned about, and that is not our concern.

Our concern is to get the information out to the American people so they can make their own decision. Like Fox News says, "We report; you decide." We've never taken a position on energy policy. What I'm saying here is I believe that what we should do right now is to set November 13, which you currently have. I realize you've just now referred my request for contempt for threatening me to the U.S. Attorney's office, but there's the other contempt issue—and they are in contempt—and we should have a hearing on that on November 13 for having defied at a minimum your orders of August 3.

[26]

The Court needs to put its foot down. It can't permit this kind of conduct. They think they have your number, in all due respect, because you are a gentleman and because you are trying to be as agreeable as possible, but this court has been flouted.

It's been disrespected, and it's time for the Court now to send a message to this administration that we're not going to allow court orders to be defied anymore, and we represent the people of this country, not the vested political elite that simply want to keep information away from them because it's election time.

So we ask that November 13 be a date for the hearing on the order to show cause with regard to the defiance of the Court's August 3 orders.

THE COURT: All right.

MR. KLAYMAN: Thank you.

THE COURT: Thank you, Counsel. Yes.

MR. BOOKBINDER: Good afternoon, Your Honor.

THE COURT : Good afternoon, Counsel.

MR. BOOKBINDER: I'll be very brief. I just want to address the two issues of irreparable injury and success on the appeal. Briefly, no court has ever held that simple preparation of a privilege log and turning over of nonprivileged information is irreparable injury. The defendants haven't found such a[27] case, we haven't found such a case, no one's ever heard such a case. So as far as we can tell, there simply is no irreparable injury.

Second, on the issue of success, defendants' theory is simple participation in the discovery process is a separation of powers problem; it violates the separation of powers theory. In *Clinton versus Jones*, the Supreme Court was so crystal clear on this point, and I don't like to quote things because we all read them, but I'm just going to quote one sentence out of *Clinton versus Jones* where we're talking about documents in deposition and trial testimony of a sitting president, and the quote is:

"The fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the chief executive is not sufficient is to establish a violation of the constitution." Period.

That's testimony from a sitting president in a civil matter concerning issues before his presidency. That, the Supreme Court held, did not raise separation of powers concerns. Therefore, we think production of

nonprivileged documents and a privilege log from the vice president and officers in the White House simply comes nowhere close to that standard. And that's all, Your Honor.

THE COURT: All right. What about the issue of stay and the discussion I had with Mr. Coffin? I'd be interested in what your views are. Mr. Coffin's views are that indeed the [28] opportunity to appeal be foreclosed unless the Court granted a stay. I disagree with that, but maybe he's correct. And if you agree with his statement, then I need to rethink this whole issue of potentially denying a request for a stay and ordering a date for compliance in the future. My view is that the government would certainly have an opportunity to seek relief from the circuit and not be under any due date unless they wait until after the 23rd of November or 22nd of November.

MR. BOOKBINDER: Your Honor, we agree a hundred percent. As a matter of fact, Mr. Coffin and I were working off a makeshift calendar to make sure we were going on the assumption that as the Court has been inclined to do, it has been ruling from the bench.

Mr. Coffin and I were thinking that perhaps they would make their stay motion to the Court of Appeals by tomorrow. We figured on perhaps a week for the Court of Appeals to rule on that, and then two weeks after that we'd wind up at the 22nd. I don't think there's any foreclosure of the appellate relief. We're not here to force the government into a contempt situation.

THE COURT: Nor am I. Nor am I. That's not the way the system should work at all. In fact, I'd be inclined to grant the government more time in which to

comply in an effort to assist the government to seek a stay in the Court of Appeals. That's the way our government works. I'm not going [29] to force anyone into a contempt citation.

And this is not a scenario where compliance is due tomorrow and someone has to get on the elevator and speed up to the Court of Appeals and then my colleagues in that court have to stop everything they're doing. I don't want to make anyone's life miserable. I don't plan on doing that by any stretch of the imagination.

MR. BOOKBINDER: Your Honor, there are two minor scheduling things again.

THE COURT: Wait a minute. Before you say that, though, let me just say I don't intend to write any more. I've written two or three orders. I don't think I need to say anything if I'm inclined to deny the stay. I think I need to find as a matter of fact and law the standards for a stay opinion review have not been met, have not been satisfied by the plaintiffs, but I don't plan to write another lengthy opinion. I don't think a need exists. Do you think the Court needs to say anything more about its views regarding the discovery dispute?

MR. BOOKBINDER: No, Your Honor. I don't think anything more needs to be written.

THE COURT: I don't either. All right, I'm sorry. You were about to mention two scheduling issues.

MR. BOOKBINDER: Yes. In terms of scheduling, since there's so many motions and matters flying around here—

[30]

THE COURT: And also I'm in trial. I'll be starting the second week of probably, I don't know, a three week trial. It's a multi-codefendant case. That's a factor that wasn't apparent some time ago because I didn't know that the case was going to go to trial. I thought that—well, anyway, we're in trial and we're going to be in trial.

MR. BOOKBINDER: Is the November 13th hearing still expected to go forward on the—

THE COURT: That's a very good question, and in all candor, it should go forward. I anticipate the government concluding its case in chief in my criminal matter Tuesday at the latest, and Tuesday would be the 5th. Looking down the road, Counsel, it's difficult to predict, but I think that Monday the 12th I'll probably be instructing a jury, I think. With a little bit of luck it will be on the 8th. So the hearing scheduled on the 13th is still on my calendar. I still plan to proceed with that hearing.

MR. BOOKBINDER: Thank you, Your Honor. Currently plaintiff's replay on their motion to compel is due Monday the 4th, and we would like an extension till Thursday the 7th and Mr. Coffin indicated he did not have—

MR. COFFIN: That's fine, Your Honor.

THE COURT: I'm sorry. What document is due on the fourth, Counsel?

MR. BOOKBINDER: Our reply brief on the motion to [31] compel is due on the 4th, and we'd like to move that to the 7th.

THE COURT: That's fine with me.

MR. BOOKBINDER: And in addition, our response to the 1292 (b) motion is also due the 4th, and we'd like to extend that to the 7th as well, Your Honor.

THE COURT: I have no problems with that. And for the government's reply to that? I assume the government —

MR. COFFIN: Well, we have some timing issues about the appeal that—

THE COURT: All right. I'll give you a chance. I'm sorry, maybe I should have heard—I can invite all three of you to the podium. It's big enough and safe enough for the three of you to be up there at one time.

MR. COFFIN: Your Honor, there are timing issues. As you know, we're not seeking simply 1292(b), but we would also, if you were to deny that, we would go up on a couple of other theories. One of them is a *Nixon* 1291 appeal, and the timing of that, we have to seek—in order to be timely, the 60-day rule applies. By our calculation, there's an order of September 9 that would be part of this appeal, and November 8 would be the deadline for doing that.

Now, I still want to try to convince you to give us a stay, so I don't want to give up this issue. But if you were to deny a stay, it's hard for me to see how you're going to [32] grant us interlocutory appeal.

THE COURT: That's why when we had the original discussion, I think that's probably going to be moot anyway.

MR. COFFIN: I don't think it will be moot. I think you could still grant it, and I would ask that you give us full consideration of such a motion. I think practically—I'm not sure—I think the writing is on the wall if you

were to deny a stay, however, depending upon what your standard was in denying the stay. As a practical matter, we believe that we have to file any appeal in the Court of Appeals by November 8.

THE COURT: All right. I'm not going to comment on that because that's beyond—

MR. COFFIN: Your Honor, I understand. I'm not —

THE COURT: You may be absolutely right. Actually, when I saw the motion for interlocutory, I thought the government was conceding there was no basis for appeal after—

MR. COFFIN: No, Your Honor. We say in the beginning of that brief we were asking you for 1292(b) certification to avoid applying the *Nixon* rule in the Court of Appeals and to avoid the need for a mandamus determination, so we clearly think any three of the methods is appropriate.

But as a result, and I'm not asking for your blessing on this, but as a result we believe we may have to seek an appeal by the 8th. And I still have to confer with the Solicitor General's Office on everything else on timing, but that would [33] mean that if you hadn't granted interlocutory appeal by then we'd be going up on other theories.

THE COURT: All right.

MR. COFFIN: So the fact that he's asking for a brief on the 7th we have no objection to, but it may force our hand to seek an appeal—well, just the timing generally. I don't think there's much time anyway, but the bottom line is we're going to have to go up I think by the 8th.

THE COURT: And again, you may be absolutely correct. I haven't given any thought to that aspect of it.

MR. BOOKBINDER: Your Honor, one other thing, and I'm not sure Mr. Coffin and I conferred on this, but it might be useful on the 13th when we're already here on the motion to compel to do the 1292(b) motion as well that day if Mr. Coffin wants to do so.

MR. COFFIN: Again, if we're already in the Court of Appeals, I think it might be mooted then. If we already filed another appeal on another theory—

THE COURT: If you have an appeal and another stay, then everything is moot, at least the motion for interlocutory—

MR. COFFIN: If we have a stay, if we have an extension.

THE COURT: I can schedule it. I agree. I have not scheduled a date. I thought that the parties had originally [34] agreed to an accelerated briefing schedule to the interlocutory, and then the government informed the Court in one of its pleadings that that was not correct.

MR. COFFIN: Well, we had—

THE COURT: You sought expedited briefings.

MR. COFFIN: We sought it, and the plaintiffs did not agree.

THE COURT: Look, I'm willing to help the parties. I've already indicated I'm not inclined to stay; I'm not inclined to certify it. By the same token, I'm not trying to make it difficult for anyone to seek review. I mean, I can schedule a hearing before the 7th if you want me to.

MR. COFFIN: Can I suggest this, that the 13th would be okay. It may be that we have decided to withdraw our interlocutory appeal by then. I think

that—and if so, we'll notify the parties. If we go up on another theory, I don't want to foreclose—

THE COURT: No, and I'm not trying to be difficult at all.

MR. COFFIN: I'm not sure I can speak for the Solicitor General of the United States on this particular issue.

THE COURT: And I'm certainly not requiring you to do so.

MR. COFFIN: Why don't we go with the 7th for your [35] brief?

THE COURT: Do you want a few minutes to talk?

MR. COFFIN: No, I think we're fine. We're in general agreement that if he could file by the 7th and we would file any response by the 12th and have a hearing on the 13th.

THE COURT: It doesn't give me a lot of time to think about that. There's a holiday on the 11th. Can you get your response in sooner than the 7th, Counsel?

MR. BOOKBINDER: I can do Wednesday the 6th.

THE COURT: That's the earliest?

MR. COFFIN: And we can file by the 8th, Your Honor.

THE COURT: That's great. It's all electronic anyway. That will be great. The 8th's a Friday, and then the hearing on the 13th will be for the pending motion as well as for the government's motion for interlocutory certification.

MR. BOOKBINDER: Thank you, Your Honor.

THE COURT: Sure.

MR. COFFIN: Your Honor, can I go back to the stay versus—

THE COURT: Yeah, sure. Go ahead.

MR. COFFIN: I want to make clear that—I mean, I understand your analysis here, Your Honor, but I think—

THE COURT: Well, tell me if it's wrong.

MR. COFFIN: I think it's incorrect. I think it's inappropriate to take into consideration the possibility of a [36] stay in the Court of Appeals in determining whether irreparable injury is met.

THE COURT: No, no. I'm sorry. If you understood me to say that I'm denying it but the Court of Appeals will grant it, I have no view as to whether the Court of Appeals will grant it. I'm just saying you have the opportunity to ask the circuit for a stay. That's why you're not foreclosed

MR. COFFIN: But that opportunity shouldn't be taken into account by this court in determining whether irreparable injury—we're asking for a stay pending appeal.

THE COURT: I was concerned because you said, Judge, if you don't grant our stay, we're foreclosed from taking an appeal. That's what you said.

MR. COFFIN: No, no, no, Your Honor.

THE COURT: Then I misunderstood you then.

MR. COFFIN: I think so. We are not foreclosed from doing so, but the relief would be mooted in the absence of a stay because our argument is that compliance with this last order of the Court imposes an unconstitutional burden on the United States. I recognize this court has

said that it disagrees with that, but it's also said it's a serious issue.

And if we are correct on the merits of that, in the absence of a stay, an appeal is meaningless because the Court will say you've already done exactly what it is that you say is unconstitutional, so it's mooted. So a stay is necessarily to [37] fully effectuate our appellate's rights here.

THE COURT: And this goes back to your argument that the injury is indeed the search.

MR. COFFIN: In part. In part, certainly.

THE COURT: Well, I'm certainly not requiring you to turn over any privileged documents at all.

MR. COFFIN: No. I know you're not doing that, but the injury is submitting to discovery in the absence of a compelling showing of need by the plaintiffs. And if our argument is correct, and we believe it is, and we believe the Court of Appeals will agree with us that it's correct, if that's correct, then we can only get relief by getting a stay of your order during the entire pendency of the Court of Appeals determination.

THE COURT: I want to make the record clear. If I deny a request for a stay, it's not because this court has any view of how the circuit court is going to address that issue at all. If I deny the request, it would be because the Court is of the opinion that there's no factual and legal predicate for a stay. That would be the only reason.

I'm going to make a decision upon the issues before me and not what some other court may do. No. I thought you said earlier on: Judge, we've lost. We're

foreclosed from appealing if you deny the request for a stay. I understand what you're saying.

[38]

MR. COFFIN: But that's true. It's mooted. We'd lose an effective right to an appeal.

THE COURT: You're saying the injury continues because we would nevertheless be searching our records, which we believe is unconstitutional.

MR. COFFIN: No, no, no, Your Honor.

THE COURT: Well, then I don't understand what's the injury then.

MR. COFFIN: When the 22nd comes and that's the date you've ordered us to comply, and we comply, then our appeal is meaningless.

THE COURT: Well, see, that's something new now.

MR. COFFIN: No, no, no.

THE COURT: Yes, it is, because granting your request for additional time is to give you time within which to seek relief so you don't have to comply. I thought you told me—

MR. COFFIN: No, no, Your Honor. These are alternative things. I mean, we are asking right now—our principal request for relief here is a stay pending the duration of the appeal. That means that whatever date you set, whether it's November 5 as it currently is, which I know you're not going to do, or November 22—which is the date we've agreed upon with the Sierra Club, at least—if we get to the 22nd and we go through the process and we produce the documents that are—

[39]

THE COURT: Is that an option that the government's seriously considering doing, producing the documents?

MR. COFFIN: Your Honor, in the absence of a stay, again, our only other option is to go into contempt.

THE COURT: Or to seek a stay from the circuit.

MR. COFFIN: In the absence of a stay. You're making a distinction again between a stay by the circuit and a stay by this court, and I don't think that in your evaluation of the merits of our stay petition you can consider whether we get a stay by the Court, because that assumes that we're entitled to a stay.

THE COURT: I guess I was trying to pin you down as to what your injury is. What you're concerned about is what happens on the 22nd if you don't have a stay from this court or the circuit.

MR. COFFIN: Absolutely.

THE COURT: Well, that's something new.

MR. COFFIN: No, no, no. That's not anything new at all. That's what I've been saying all along.

THE COURT: Well, you know what, I think we should focus on that if that materializes. In other words, if I deny a stay and the circuit denies a stay and you're faced with the 22nd for a deadline, then I think —I mean, it would be very unwise for me to sit here and say what I'm going to do at that point.

[40]

MR. COFFIN: Your Honor, if you deny a stay and the Court of Appeals denies a stay, then there's been some —and the Supreme Court, if we were to ever decide to go that far, a circuit justice, which is a possibility again

—then compliance with the order is either mandatory or we have to go into—

THE COURT: Don't we have to cross that bridge when we get to?

MR. COFFIN: No, I think you have to cross it now. I think that you have to make a determination whether compliance with your order, whether it would moot the appeal, and that is the determination

THE COURT: All right. Well, that's where we disagree. That's where we disagree, because I've given this a is lot of thought, and I said, I'm going to extend the time. Sierra Club doesn't object, Judicial Watch does, the government is attempting to comply, searching its records. I believe your pleading says there are eight lawyers at the White House searching boxes of records in an effort to determine privileged versus nonprivileged and preparing a log.

I said that's good faith compliance; I'll give the government more time. And so that no one has any anxiety about this, I'll make the 22nd or 23rd, some day in November other than Thanksgiving, I'll make it that week. And I'm still, inclined, gave a lot of thought as to whether or not to grant [41] the request for stay, and I said no. I'm not persuaded there's a factual legal predicate.

That's the only reason why I would deny the request for a stay, if I'm not persuaded it's a matter of fact and law that a basis exists. Denied that. I thought about it. Now, where does that leave the government? It leaves the government—the government can always seek a stay. In fact, you have to seek a stay first—

MR. COFFIN: But that's—

THE COURT: Wait, wait, wait. You have to seek a stay first before me before you can seek a stay in the circuit, right? You have to do that.

MR. COFFIN: And we're required to do that.

THE COURT: And if I deny it, then the safeguard, is the way our system works is that you can seek another stay in the circuit. Now you're concerned about a scenario where the circuit may deny a stay and you're faced with what to do on the 22nd, but that's not before me.

MR. COFFIN: No, no. It is definitely before you, Your Honor.

THE COURT: So I should be focusing on that now?

MR. COFFIN: Absolutely. The order right now that's in front of you—

THE COURT: You know what, let me tell you something. You know I'm not going to close the door on you or any other [42] litigant before me, and if indeed I deny the stay and the circuit denies the stay, you know this courthouse is open to whatever request you want to make prior to the 22nd. And I'll be receptive to whatever request you want to make, but we're looking down the road to something—I mean, I think it would probably be inappropriate for me to say what I would do in the event that there's no stay of my order and whether or not the government then is under an obligation to comply with my order.

MR. COFFIN: Your Honor, right now your order requires us to produce by November 5.

THE COURT: All right. Forget about that. I'm going to extend it to the 22nd or the 23rd.

MR. COFFIN: The point is it doesn't matter whether it's November 5 or—

THE COURT: Oh, I think it does. It would matter if the due date was tomorrow, wouldn't it?

MR. COFFIN: Well, it would just mean—

THE COURT: Well, you know what—

MR. COFFIN: —an emergency reason to provide a stay.

THE COURT: Well, that's exactly right. But that heightened—no, no. Wait a minute; I gotcha now. Because if I deny the request for the stay and the due date was tomorrow and the circuit denied the request for a stay, then you're a absolutely correct. You need some guidance from me as to what [43] I need to do because you need to take some steps to protect your client. But that's not a problem. You don't have to concern yourself about that.

The Court is always open. The Court is always going to be receptive to your request for additional relief in the event that I deny the stay, which I'm going to do, and in the even if the circuit denies the stay and you believe your client is powerless, I'm not going to close the door on your request for relief.

MR. COFFIN: No, and I fully understand and appreciate that, Your Honor, but I don't think this court appreciates what the issue is here. The issue here is whether a stay pending appeal is necessary to fully effectuate our appellate rights. As soon as this stay issue is resolved, we're going to be taking up the appeal in one way another, whether through 1292(b) or 1291 or mandamus. So your chance to rule on whether there is a stay pending appeal is now, and that requires you to

decide whether a stay is necessary to fully effectuate our appellate rights.

In an absence of a stay, compliance with your order is mandatory or we face contempt. That is why that issue is joined in front of you now, and that's why a stay has to be granted. You don't argue that—you haven't disagreed with us, and I don't think the plaintiffs really have, that these are serious issues. You've said that yourself. So the only [44] issue is whether there is irreparable injury, and there is certainty irreparable injury if an appeal goes forward and we lose our effective appellate rights in the absence of a stay.

That's the argument, and that issue is in front of you right now, whether it's November 5, whether it's November 1, or whether it's November 22. And you have to decide that now, and you can't say that because we can go to the Court of Appeals that we have a remedy. Because in reality, they're going to be asking the same questions, and if you are saying we have a remedy—

THE COURT: They'll be asking the same questions I'm asking?

MR. COFFIN: Absolutely.

THE COURT: Sure. I would imagine so.

MR. COFFIN: But if you were saying we have an effective remedy in the Court of Appeals, it's because the Court of Appeals would agree with us. So I don't understand—

THE COURT: No, I'm just saying you have an opportunity to seek relief in the Court of Appeals. I didn't say it was a foregone conclusion. Again, I don't know what the circuit court's going to do. I can appre-

ciate that the Court may have the same questions, but you're not being deprived of a potential remedy. You have the right to request a stay. That's the point I was making.

MR. COFFIN: But Your Honor, our argument isn't that [45] we have an opportunity to seek a stay in the—we're not being deprived of that. I've never argued that. We certainly have an opportunity to seek a stay in the Court of Appeals. The question is whether we'd be deprived of our underlying appeal. This is just like Judge Kessler recently in the CNSS detainee FOIA case. Once those documents are released and I know — no, no. I understand what you're going to say.

THE COURT: That's the distinction.

MR. COFFIN: There's no distinction legally because our argument is that—Your Honor, our argument is that once we comply with this order, we can't get effective relief from your order.

THE COURT: And I totally agree with you. If you completed your search, keeping in mind what you just said about Judge Kessler's case, if you completed your search, isolated the documents, prepared the privilege log and gave everything over, it's probably moot.

MR. COFFIN: Your Honor, the legal—

THE COURT: You've complied with it—

MR. COFFIN: Your Honor—

THE COURT: —but I wouldn't do that.

MR. COFFIN: Your Honor, you're missing the major point that's made in these cases. In this case there certainly would be harm from releasing the documents, but I'm not talking about that. I'm talking about com-

pliance with your order. We [46] have argued that compliance with your order imposes an unconstitutional burden.

THE COURT: Right. The serious preparation of the log.

MR. COFFIN: Yes, and once we comply with that order, we have assumed that unconstitutional burden. So it's the same exact argument that Judge Kessler accepted.

THE COURT: You're complying with the order now, so maybe the controversy is moot.

MR. COFFIN: No, Your Honor.

THE COURT: You're argument is that compliance with my order to undertake a search and preparation of a log has some impact on this—

MR. COFFIN: Yes, there is certainly some impact. No, it's not moot. We are realizing that harm right now out of deference to this court. Yes, that is absolutely correct. We are realizing a harm right now.

THE COURT: But you're complying with it.

MR. COFFIN: If you accept our argument—

THE COURT: Why is it different then from a litigant turning over privileged documents and complying with the harm? Doesn't that moot the controversy?

MR. COFFIN: It's no different. It's the exact same point. If you turn over privileged documents, you've mooted an argument about privilege; if you turn over documents where you say [47] you don't have to comply with an order, you've mooted a dispute about the order. That's exactly our argument.

THE COURT: And you're complying with the order now by undertaking a search that you believe is unconstitutional, so why isn't this controversy moot?

MR. COFFIN: It is not moot because we still have an obligation to comply with your order and we haven't fully complied. So yes, we are being harmed right now by your order under our position. There is no question that turning the Office of the Vice President upside down imposes a burden on us, and we are realizing that burden out of deference to this court's order. Having said that, we haven't—

THE COURT: Well, it's certainly not my intent to turn anyone's office upside down when I issue my orders. Thank you, Mr. Coffin. Anything further? I just want to take a short recess. Mr. Klayman?

MR. KLAYMAN: Just a last point, Your Honor. This is why Your Honor has to just make a ruling and live by it. We went through this during the Watergate and the Nixon period. Nixon didn't want to turn anything over to Judge Sirica. He put his foot down and said I've had enough, that's it, turn it over.

THE COURT: All right. I'm going to take a 10-minute recess.

(Recess)

[48]

THE COURT: All right, Counsel. I'm going to think about the issue. I'll continue the hearing until 10 o'clock tomorrow morning, and I'll rule on the government's request for a stay at that time. Thank you, Mr. Coffin, for the points that you've made, and I'll give it some further thought. I'm still inclined to deny it, but I want

to consider the request in light of your representations this afternoon.

MR. COFFIN: Thank you.

THE COURT: All right. The parties are excused. Thank you. I'm sorry, to the attorneys on the phone, did you wish to say anything?

MR. NARAYAN: No, Your Honor.

THE COURT: All right. You're welcome to participate tomorrow if you wish. I recognize that's early on the West Coast, but that's the only time I can squeeze this matter in. It'll be 10 o'clock Eastern Time tomorrow. Thank you.

(Proceedings adjourned at 2:25 p.m.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 01-1530 (EGS)

JUDICIAL WATCH, INC., PLAINTIFFS

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP,
DEFENDANTS

Civil Action No.: 02-631 (EGS)

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, ET AL.,
DEFENDANTS

Nov. 1, 2002

ORDER

Pending before the Court is non-agency defendants' motion for a stay of proceedings pending appeal of this Court's October 17, 2002, September 9, 2002, and July 11, 2002 Orders authorizing limited discovery from defendants on threshold issues, and ordering defendants to produce non-privileged documents responsive to plaintiffs' discovery requests, along with a privilege log identifying those documents for which defendants believe there is a valid basis for the assertion of a privilege. Upon careful consideration of defendants'

motion, the response and reply thereto, and the relevant legal authority, and for the following reasons, it is by the Court hereby

ORDERED that defendants' motion for a stay is **DENIED.**

I. BACKGROUND

Non-agency defendants move for a stay of, inter alia, this Court's October 17, 2002 order, which requires them, consistent with this Court's August 2, 2002 Order and July 11, 2002 Memorandum Opinion and Order, to respond to plaintiffs' First Set of Interrogatories and to produce by no later than November 5, 2002, non-privileged documents responsive to plaintiffs' First Request for Document Production, along with a log identifying specific documents or particularized categories of documents for which they assert that a privilege precludes production, and. Defendants seek a stay to pursue an appeal to the Court of Appeals for the D.C. Circuit, on the grounds that this Court's Orders implicate important constitutional and statutory questions that are best resolved by the Court of Appeals before litigation proceeds any further in this case.

II. LEGAL STANDARD

The following factors are to be considered when determining whether a stay pending appeal is warranted:

> (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. To justify the granting of a stay, a movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or vice versa.

Cuomo v. *United States Nuclear Regulatory Commission*, 772 F.2d 972, 974 (D.C. Cir. 1985); *Washington Metropolitan Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841, 842, 843 (D.C. Cir. 1977). It is "the movant's obligation to justify the court's exercise of such an extraordinary remedy." *Cuomo*, 772 F.2d at 978. This Circuit has recently reiterated that a moving party must satisfy "stringent standards required for a stay pending appeal." *Summers* v. *Howard University*, 2002 WL 31269623 (D.C. Cir., Oct. 10, 2002). Where a moving party fails to establish a substantial case on the merits, and further fails to "demonstrate that the balance of equities or the public interest strongly favors the granting of a stay," a motion for stay is properly denied. *Cuomo*, 772 F.2d at 972.

A. Likelihood of Success on the Merits

Recognizing that this Court has, on numerous occasions, rejected their arguments to this effect, defendants nevertheless continue to assert that court orders requiring them to respond in any fashion to plaintiffs' discovery requests creates an "unconstitutional burden" on the Executive Branch unless plaintiffs are first required to demonstrate "compelling need" for the discovery sought. Defendants have cited no authority, and indeed this Court knows of none, which supports this proposition. To the contrary, every case cited by the defendants in support of their position involved precisely the same procedure adopted by this Court in this case. Moreover, the U.S. Supreme Court has

recently confirmed the continued validity of the precedent of long-standing relied upon by this Court in the Orders and Opinions contested by defendants. As recently as 1997, the nation's highest court held

> In sum, "[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States." . . . the Judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct. . . . [emphasis added]

Clinton v. *Jones*, 520 U.S. 681, 705, 117 S. Ct. 1636, 1650 (1997). Here, as in Jones, this Court is of the opinion that defendants "err[ ] by presuming that interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionality forbidden impairment of the Executive's ability to perform its constitutionality mandated functions." See *Clinton* v. *Jones*, 520 U.S. at 702, 117 S. Ct. at 1648.

Notwithstanding this U.S. Supreme Court precedent, and the absolute dearth of authority supporting their arguments, defendants nevertheless contend that requiring them to review documents responsive to plaintiffs' discovery requests, disclose those for which no viable claim of privilege exists, and assert any applicable privileges with respect to specific documents, impermissibly interferes with "core Article II" functions and imposes an unconstitutional burden on the Executive Branch. The Court rejects these arguments and is not persuaded by defendants' assertion that they have demonstrated a likelihood of success on the merits of their appeal of this Court's Orders.

B. Irreparable Harm

Under this Circuit's precedent, the harms to each party are tested for "substantiality, likelihood of occurrence, and adequacy of proof." *Cuomo* 772 F.2d at 976, 977. The Court must consider the significance of the change from the status quo which would arise in the absence of a stay, as well as likelihood of occurrence of the claimed injury, when determining whether defendants have truly met their burden of demonstrating irreparable harm justifying imposition of a stay. See *id.*

The fact of the matter is that the offices of the President and Vice President currently respond to discovery requests on a regular basis, asserting executive privilege with respect to specific requests for particular items when necessary. See, e.g. *Clinton* v. *Jones*, 520 U.S. at 704, 117 S. Ct. at 1649.

Plaintiffs correctly point out that, in the cases cited by the defendants, stays of court orders authorizing discovery against officers of the Executive Branch have been granted only in cases where a court ordered production of a particular document after a viable claim of privilege had been made. See e.g., *Nixon* v. *Sirica*, 487 F.2d at 721 (approving stay of District Court orders either allowing or refusing disclosure of specific documents for which President has made a particularlized claim of privilege).

Moreover, it is in fact defendants who seek to change the status quo by asking this Court to relieve them of their responsibility to respond to plaintiffs' discovery requests and assert executive privilege where appropriate. Defendants' argument that any "discovery directed at" them imposes an unconstitutional burden on them absent a showing by plaintiffs of "compelling

need" represents a dramatic new argument with respect to invocation of executive privilege, and contemplates the wholesale elimination of an entire step in the established discovery processes in this context. Furthermore, defendants themselves concede that, at least in some respects, they are seeking to expand the executive privilege, not simply rely on its settled contours. See Def.'s Mot. for Stay at 8 (claiming that requiring disclosure of documents which "may not be technically privileged" would nonetheless impose unconstitutional burdens on the Executive Branch).

There is no doubt that, if defendants' premise is accepted that compliance with this Court's discovery order imposes an unconstitutional burden, defendants would suffer irreparable harm if the proceedings before this Court were not stayed to enable them to seek appellate review of such an order. However, this Court has consistently rejected, and continues to reject, in reliance upon established precedent of long-standing, defendants' central argument, namely that requiring the Vice President and members of the Executive Branch to merely review documents requested by the plaintiffs and assert executive privilege where appropriate, is unconstitutional. Defendants cannot be permitted to manufacture irreparable harm by simply stating a legal principle with no precedential support whatsoever, and then claiming irreparable harm if they believe a court order violates that principle.

Accordingly, there is insufficient likelihood of "irreparable harm" to the defendants to justify a stay. Both the Circuit and the U.S. Supreme Court have approved the very "harm" defendants point to: discovery procedures in which a request for documents from a member of the Executive is made in the context

of judicially supervised discovery, the document is either produced or a privilege is asserted with respect to the document, and, in the latter case, the party seeking the document must demonstrate that the public need for the document outweighs the interests underlying the privilege in order to obtain production of the document. See, e.g., *Clinton* v. *Jones*, 520 U.S. at 704-05; *In re Executive Office of the President*, 215 F.3d 20, 22, 24; *Dellums* v. *Powell*, 561 F.2d 242, 247, 248 (D.C. Cir. 1977); see also *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 439-455 (1977).

C. Public Interest

Conversely, the harm to both the plaintiffs and the public of granting the stay is substantial, likely, and adequately proven. As plaintiffs point out, Congress, Executive agencies, and the public have been debating the energy policy developed by defendants without the benefit of the information sought by plaintiffs in this case. In some instances, final actions have already been taken. As time proceeds, the value of the information sought by plaintiffs and the public declines substantially, thereby effectively denying plaintiffs the relief to which they contend they are entitled. Additionally, both Congress and the Judicial Branch have recognized the public interest in avoiding "piecemeal "litigation occasioned by stays and interlocutory appeals. See, e.g., *United States* v. *Nixon*, 418 U.S. 683, 690 (1974).

Therefore, upon balancing of relevant factors, this Court concludes that there exists no factual or legal predicate for granting defendants a stay pending appeal. Accordingly, defendants' motion for stay pending appeal is hereby **DENIED**; and it is

FURTHER ORDERED that defendants' alternative motion for an extension of time in which to respond to plaintiffs' first request for document production is **GRANTED**; and it is

FURTHER ORDERED that defendants shall fully comply with this Court's outstanding Orders by no later than **November 29, 2002.**

Additionally, pursuant to the hearing held on defendant's motion for stay on October 31, 2002, and for the reasons given in open court, it is by the Court hereby

FURTHER ORDERED that plaintiffs shall file their response to defendants' motion for certification pursuant to 28 U.S.C. § 1292(b) by no later than **November 6, 2002** and defendants shall file their reply by no later than **November 8, 2002**; and it is

FURTHER ORDERED that defendants' motion for certification pursuant to 28 U.S.C. § 1292(b) shall be considered at the currently scheduled **November 13, 2002** hearing on all pending motions; and it is

FURTHER ORDERED that plaintiffs shall file a reply in support of their motions to compel by no later than **November 7, 2002.**

Signed: EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE
November 1, 2002

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 01-1530 (EGS)

JUDICIAL WATCH, INC., PLAINTIFF

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP, ET AL., DEFENDANTS

C.A. No. 02-631 (EGS)

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, IN HIS OFFICIAL CAPACITY, ET AL., DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that Vice President Richard Cheney, a Defendant in the above-named consolidated cases, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from (i) the order entered in this action on the 1st day of November 2002; (ii) the order entered in this action on the 17th day of October 2002; and (iii) the order entered in this action

on the 9th day of September, 2002.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-
[Civil Action Nos. 01-1530, 02-631 (EGS)

IN RE RICHARD B. CHENEY,
VICE PRESIDENT OF THE UNITED STATES, *ET AL.*,

EMERGENCY PETITION FOR
WRIT OF MANDAMUS

INTRODUCTION AND SUMMARY

The Vice President of the United States and the other defendants in these consolidated cases respectfully petition this Court for a writ of mandamus to direct the district court to decide this case on the basis of the administrative record, a course dictated by fundamental principles of review under the Administrative Procedure Act and by the substantial constitutional questions presented by the discovery ordered in this case. We also ask that the Court direct that the Vice President, who is not an "agency" within the meaning of the APA, be dismissed as a party.

The Vice President, who can appeal the court's rulings as of right under *United States* v. *Nixon*, 418 U.S. 683 (1974), has filed a notice of appeal, and, in the interests of expedition, stands ready to file an opening brief on whatever schedule the Court deems appropriate.

1. Plaintiffs in these actions allege that the National Energy Policy Development Group ("NEPDG") —an Executive Branch task force established by Presi-

dent Bush, composed of the Heads of Departments and close Presidential advisors, and chaired by the Vice President—operated in violation of procedures established by the Federal Advisory Committee Act ("FACA"), 5 U.S.C. Appendix 2. Plaintiffs' suits are, on their face, devoid of merit: the FACA has no application to committees that are "composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government." *Id.* § 3(2). The President's directive established the NEPDG as an entity composed exclusively of federal officers and employees. App. 117-18. The NEPDG's final report confirms that it operated as such. *See Reliable, Affordable, and Environmentally Sound Energy For America's Future: Report of the National Energy Policy Development Group* ("Report") (available at www.whitehouse.gov/energy). As the government also urged in its motion to dismiss, application of the FACA to a group of close Presidential advisors chaired by the Vice President would be unconstitutional. *See Association of American Physicians and Surgeons, Inc.* v. *Clinton*, 997 F.2d 898, 909-10 (D.C. Cir. 1993) ("*AAPS*").

The district court nevertheless denied the government's motion to dismiss, reasoning that it was sufficient for plaintiffs merely to *allege* that the President's formal and express specification of the group's membership, and the group's confirmation of its composition in its final report, did not accurately portray the membership of the group. The court then denied the government permission to file a motion for summary judgment, refusing to decide the case on the basis of the President's own directive, the group's final report, and a supplementary affidavit filed by the government that confirmed that the NEPDG consisted only of top-level

government officials and that its meetings were attended only by government personnel. The court also refused to dismiss the Vice President as a party, concluding that mandamus review of his actions on behalf of the President in chairing the NEPDG might be available.

Instead, the court approved a far-ranging discovery plan that seeks production of documents and information beyond what would be obtained under the FACA itself if plaintiffs ultimately succeeded on their claim. The documents covered by the discovery order include communications between individual NEPDG members outside the context of group meetings, between NEPDG members and agency personnel, and between NEPDG members and outside individuals. *See, e.g.*, App. 246, Request for Production No. 3; App. 251, 253, Plaintiffs' First Set of Interrogatories, ¶ B and Interrogatories Nos. 3, 4.

The government then attempted to limit discovery against those defendants with the greatest operational proximity to the President, especially absent a showing of need. The court rejected those efforts and ordered the Vice President and other close presidential advisors to comply with plaintiffs' discovery requests.

2. The court's orders find no basis in the FACA, contravene fundamental principles of judicial review of actions of the Executive Branch, as well as interbranch comity, and engender (and, indeed, magnify) the very constitutional problem that the district court believed it could avoid by declining to resolve the constitutional questions raised by this suit and instead focusing on the statutory question of whether the FACA applied to the NEPDG.

Because, as the district court recognized, the FACA confers no private right of action, a suit alleging that federal officials failed to comply with the FACA must proceed under the APA, as a suit for judicial review of agency action. The APA does not apply here, however, because neither the President nor the Vice President (who acted on behalf of the President in chairing the NEPDG) is an "agency" for purposes of the APA. The district court suggested (but has not yet decided) that an action might lie against the Vice President under the general terms of the mandamus statute, 28 U.S.C. 1361, notwithstanding Congress's decision to omit any statutory cause of action in this setting. Such a suit would itself raise serious constitutional problems in a case involving a group in such close proximity to the President. Under either approach, however, review is limited to the administrative record: courts are not authorized to permit discovery into the inner workings of the Executive Branch except in extraordinary instances. The President and Executive Branch agencies routinely create intragovernmental working groups and task forces to address a broad range of issues. The FACA, by its terms, expressly exempts such intragovernmental groups from its reach. Neither the FACA nor the APA contemplates discovery into the workings of these groups based on bare assertions that the groups are subject to the FACA.

The district court's premise in permitting discovery was that plaintiffs were entitled, as a matter of law, to investigate whether the membership of the committee was materially different than the membership prescribed by the President and reported by the committee itself. This stands customary presumptions of administrative regularity on their head, and does so in a

context fraught with separation-of-powers difficulties. The proceedings of Executive agencies are accorded a presumption of regularity, and allegations of bad faith warrant discovery only upon a strong preliminary showing that misconduct has occurred. That showing plainly has not been made here. Even in a run-of-the-mill APA action, discovery into the conduct of agency decisionmakers would not be permitted based on a generalized assertion that "the government doesn't always comply with the law." App. 217, Tr. of Aug. 2, 2002 Hearing.

Such principles should apply, *a fortiori*, when the consequences of ordering discovery is to allow substantial intrusions on the process by which those in closest operational proximity to the President advise the President. The discovery of the Vice President compelled by the district court would result in even more sweeping intrusions into the Vice President's office than would result from the remedies available if plaintiffs were to prevail on the merits of their suit. Accordingly, by allowing such discovery on the mere allegation of "unofficial" members, the District Court eliminated the FACA's exemption of intragovernmental groups as a practical matter. That ruling creates, rather than avoids, constitutional difficulties.

Contrary to the district court's understanding, the Vice President should not be forced to review the process by which he advised the President and claim executive privilege to protect privileged papers in response to an unsupported allegation that the membership of the President's advisory committee was materially different than that proscribed by the President. In particular, the Vice President of the United States respectfully but resolutely maintains, in

the circumstances of this case, that extending the legislative and judicial powers to compel a Vice President to disclose to private persons the details of the process by which a President obtains information and advice from the Vice President raises separation of powers problems of the first order. Discovery against the Vice President should not proceed, especially absent a compelling countervailing interest and a special showing of need. No such countervailing interest or showing has been made here and, in light of the ample record of agency materials already provided to plaintiffs, it is plain that no such demonstration could be made.

3. The district court's error is compounded by its refusal to dismiss the Vice President as a party. The Vice President is not an "agency" within the meaning of the APA, and the scope of non- statutory review recognized by this Court does not extend either to actions directly against the Vice President or to the type of error alleged in this case. Moreover, as the Supreme Court has made clear in recent decisions, *see, e.g.*, *Gonzaga Univ.* v. *Doe*, 122 S. Ct. 2268, 2276 (2002), implied judicial review is inappropriate when a particularized provision allows only limited review (or no review). Here, the APA limits review to the agency record and does not reach the Vice President. No evidence exists that Congress, in declining to provide a cause of action under the FACA itself and declining to extend the APA to the President or the Vice President, intended to permit *greater* intrusion into the top levels of the Executive Branch than is available even against a regular agency in an ordinary suit under the APA.

In sum, the district court's refusal even to consider a motion for summary judgment and its approval of

intrusive discovery constitutes clear and significant error warranting the exercise of this Court's supervisory authority and requiring reversal in the Vice President's appeal.

STATEMENT

A. *Facts.*

President Bush established the NEPDG as an entity within the Executive Office of the President in a memorandum dated January 29, 2001. *See* App. 117. The President named the Vice President to preside over meetings and direct the work of the NEPDG and designated a number of other senior federal officials to constitute the NEPDG.[1] In addition, the Vice President was authorized to invite the participation of the Chairman of the Federal Energy Regulatory Commission, the Secretary of State and "other officers of the Federal Government." App. 118.

The NEPDG's mission was to "develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State, and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy." *Ibid.* The NEPDG was given no operational or administrative responsibilities; rather it was

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[1] These were: the Secretary of the Treasury, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Transportation, the Secretary of Energy, the Director of the Federal Emergency Management Agency, the Administrator of the Environmental Protection Agency, the Assistant to the President and Deputy Chief of Staff for Policy, the Assistant to the President for Economic Policy, and the Assistant to the President for Intergovernmental Affairs. App. 117-18.

directed to "gather information, deliberate, and, as specified in this memorandum, make recommendations to the President." *Ibid.* Staff assistance was to come from the Department of Energy and, if necessary, from the National Economic Council. App. 118-19.

On May 16, 2001, the NEPDG issued a public report containing a set of recommendations to enhance energy supplies and encourage conservation. *See Report* (available at www.whitehouse.gov/energy). In accordance with the President's January 2001 memorandum, App. 119, the NEPDG was terminated on September 30, 2002, at the end of the fiscal year.

B. *Proceedings Below.*

Plaintiffs Judicial Watch, Inc. and Sierra Club filed these consolidated actions against Vice President Cheney, the NEPDG, and various federal officials and private individuals, alleging that the NEPDG was an advisory committee within the meaning of the FACA. Plaintiffs requested access to NEPDG documents and a declaration that the defendants violated the FACA. App. 48, 113-15. The government filed motions to dismiss, arguing, *inter alia*, that any application of FACA to a group such as the NEPDG, with such close proximity to the President and the Vice President, would violate the separation of powers.

The district court granted in part and denied in part the government's motions to dismiss. The court held that FACA itself provides no private right of action, but that the statute is enforceable through either the APA or an action for mandamus. The court recognized that the Vice President is not an "agency" within the meaning of the APA, App. 148-49, but left open the

prospect that the Vice President could be sued through mandamus, App. 169.

The court deferred ruling on the government's contention that application of the FACA to the NEPDG would violate the separation of powers, on the ground that discovery into the inner workings of the NEPDG with a view toward deciding whether FACA applied as a statutory matter could obviate the need to resolve that constitutional question, App. 170-94. The court acknowledged "the seriousness of the constitutional challenge raised by defendants to the application of the FACA," App. 171, and it recognized that allowing discovery could present related constitutional questions, App. 193.

The court directed plaintiffs to submit a proposed discovery plan, which it approved on August 2, directing the government to "fully comply with" plaintiffs' discovery requests or "file detailed and precise objections to particular requests." App. 238-39. In their initial set of interrogatories and document requests, plaintiffs have requested, *inter alia*, the production of documents and information concerning communications between individual NEPDG members outside the context of group meetings, between members and agency personnel, and between members and outside individuals. *See, e.g.*, App. 246, Request for Production No. 3; App. 251, 253, Plaintiffs' First Set of Interrogatories, ¶ B and Interrogatories Nos. 3, 4.

The government sought a protective order with respect to discovery against the Office of the Vice President and urged the district court to consider a motion for summary judgment and rule on the basis of the administrative record in accordance with established APA procedure. In addition, the government sub-

mitted an affidavit of Karen Knutson, the Deputy Assistant to the Vice President for Domestic Policy, who detailed attendance at all meetings of the NEPDG and of a so-called "Staff Working Group." App. 257. Ms. Knutson confirmed that all members of the NEPDG, and persons who attended its meetings, were government officers or employees. She also represented that all of the members of the staff assembled by the Office of the Vice President to assist the NEPDG were government employees, as were other staff from federal agencies that helped draft the report. The latter staff met on "numerous" occasions. The only person from outside the government was a consultant who attended "brief" portions of two or three meetings of staff-level personnel to assist with technical drafting and graphic design matters related to preparation of the report but did not participate in any substantive way in the deliberations or work of the NEPDG or its staff. *See* App. 261-62, ¶¶ 10, 13.

The court denied the government's motion for a protective order, App. 313, and declined to allow the government to file a motion for summary judgment, App. 264.[2] On November 1, 2002, the court denied the government's motion for a stay pending appellate review and required that the government respond to discovery by November 29, 2002. App. 371-72.

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[2] Because the defendants have been prohibited from filing dispositive motions, they are also unable to dismiss Andrew Lundquist from the suit, despite the uncontested fact that he is no longer a federal employee (and no successor has been named because the NEPDG no longer exists). *See* App. 258, Knutson Declaration ¶ 3.

ARGUMENT

I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1651 AND 28 U.S.C. § 1291.

A. Mandamus is neither lightly sought nor lightly granted. But when district court orders implicate core separation of powers concerns and compel discovery that implicates the same constitutional difficulties this Court has sought to avoid, mandamus is appropriate. Indeed, both the Supreme Court and this Court "have expressed a willingness to employ the writ in an advisory capacity to answer important questions of first impression and in a supervisory capacity to remedy certain classes of error not traditionally thought remediable by mandamus." *United States* v. *Hubbard*, 650 F.2d 293, 309 n.62 (1980); *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 257-60 (1957).

As we show below, the district court's error is plain, the constitutional questions raised are substantial, and the consequences are significant and irremediable. When a district court ignores settled principles of judicial review and orders sweeping intrusions into the Presidency and Vice Presidency, this Court should exercise its supervisory powers.

Whether the Vice President is properly named as a party and whether he is obliged to comply with plaintiffs' demands is subject to an appeal as of right. *See United States* v. *Nixon*, 418 U.S. 683 (1974). For essentially the same reasons that the Court found an appealable final order there, this Court should do so here. Just as with the President, it would be unseemly to compel the Vice President—the only Article II officer other than the President named in the Constitution, *see* U.S. Const., Art. II, § 1; *id.* Amend. XII; *id.*

Amend. XX—to go into contempt in order to obtain appellate review of an order authorizing discovery into his conduct in advising the President on matters of the highest significance.[3] Accordingly, the Vice President has filed a separate notice of appeal. Nonetheless, we have included the objections which will be explored in more detail in the appellate papers in this mandamus petition to provide this Court with the option of reviewing the district court's unprecedented orders without definitively determining that *Nixon*'s holding applies to the Vice President.

II. PLAINTIFFS MAY NOT OBTAIN DISCOVERY INTO THE ACTIVITIES OF A GROUP CONSISTING OF THE VICE PRESIDENT, HEADS OF DEPARTMENTS, AND SENIOR PRESIDENTIAL ADVISORS BASED ON A BARE ALLEGATION THAT SUCH A GROUP ACTUALLY INCLUDES NON-GOVERNMENT MEMBERS.

A. Review Of Executive Action Under The APA And The FACA Is Limited To The Record Compiled By The Responsible Executive Official And, Where Appropriate, Supplemental Declarations.

The FACA contains no provision for judicial review, and its provisions are enforceable pursuant to the Administrative Procedure Act and its limitations. *See Claybrook* v. *Slater*, 111 F.3d 904, 908-09 (D.C. Cir. 1997).

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[3] The government moved the district court to certify a number of its orders for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The court has deferred action on that motion until November 13, 2002.

Absent extraordinary circumstances, review under the APA is limited to the administrative record. *See, e.g., Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985); *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam). A plaintiff cannot circumvent the limitations on APA review by stating a parallel claim for mandamus. Indeed, the principle of confining review to the administrative record predates the APA, *see Texas Rural Legal Aid, Inc.* v. *Legal Services Corp.*, 940 F.2d 685, 698 (D.C. Cir. 1991), and thus governs claims for mandamus as well.

Nothing in the language or history of the FACA suggests that Congress believed it was routinely authorizing the type of extraordinary discovery into government operations that is foreclosed under the APA. The FACA itself makes clear that Congress was aware that the government commonly makes use of inter-agency and intra-agency task forces consisting of government officers and employees and exempted such groups from its coverage. *See* 5 U.S.C. Appendix 2, § 3(2). Congress plainly did not intend that any plaintiff could obtain discovery into the inner workings of such a group merely by alleging that group members had contacts with outside persons and that such outside persons might have been accorded a role in the group that was the functional equivalent of formally designated members and for that reason should be deemed members of the group within the meaning of FACA. To the contrary, by providing no private right of action under FACA, and thus making FACA judicially enforceable only through the APA, Congress preserved familiar principles of record review.

The record in this case makes clear that the NEPDG was established as a group of high- ranking government

officials and that it consisted only of those officials. The President's memorandum establishing the NEPDG appointed only federal officials as members and made clear that only "officers of the Federal Government" could be invited to participate. App. 117-18. Consistent with that directive, the NEPDG's final report lists only federal officials as members. *See* Report (available at www.whitehouse.gov/energy). *See also* App. 261-62, Knudson Declaration (describing group membership); App. 93, Letter from David Addington, Counsel to the Vice President to plaintiffs' counsel (explaining that all of NEPDG's members were federal employees).

Where public documents make clear that the government has established a group consisting only of government officers and employees, settled presumptions of regularity preclude broad-based discovery premised on unsupported allegations that the government proceeded in bad faith. *A fortiori* that is so with respect to a group designated by the President and consisting of Cabinet officers and close presidential advisers. In such a case, a court should rule on a FACA claim on the basis of an administrative record and such supplemental declarations as it may require. It may not permit discovery that would be barred in any other APA suit. *See Camp* v. *Pitts*, 411 U.S. at 142-43.

The district court's discovery rulings also reflect a fundamental misconception of both the nature of the FACA and the need to proceed with care in those circumstances in which the FACA implicates the discharge of core Article II powers. The FACA was not designed to limit or chill the way in which the President or Vice President communicate with members of the public whenever an Executive Branch group is preparing a report. The FACA was designed to control

the growth and operation of blue ribbon committees and establish openness in their operations, and a balance in their membership. *See* 5 U.S.C. Appendix 2, § 2; *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 445-46 (1989). If the government wishes to formalize a committee to obtain consensus advice from outsiders, it generally must follow FACA procedures. But the statute does not come into play whenever a member of an intra-governmental group has contacts with outside persons, or even if an outside person has contacts or attends a meeting of the group as a whole. Such contacts with government at all levels are common, entirely lawful, important to informed government, a critical aspect of our democratic process, and indeed inherently related to the right of petition protected by the First Amendment. This case concerns the wholly different question whether a *group* of persons was *officially* constituted to include persons from outside the government and to deliberate and offer advice on a *collective* basis. As this Court has explained, "[s]ince form is a factor" of importance in determining whether FACA applies, the government has considerable control over whether a group it establishes is subject to FACA. *AAPS*, 997 F.2d at 914. Thus, "it is a rare case when a court holds that a particular group is a FACA advisory committee over the objections of the Executive Branch." *Ibid.* Contrary to the district court's understanding, discovery into all communications and meetings by the Vice President or other NEPDG members or staff with outside persons would have little or no bearing on the character of the committee itself, even if (despite the record review principles discussed above) it were otherwise permissible. Nor, given the separation of powers concerns implicated by the discovery authorized here, does it make sense to treat a

straightforward effort by the President to obtain advice from his closest advisers as the "rare case" based on nothing more than an unsupported allegation that "unofficial" members participated.

B. The District Court's Order Reverses The Normal Presumption Of Regularity.

The district court nevertheless believed that discovery should be available as a matter of course because "the government doesn't always comply with the law." App. 217, Tr. of Aug. 2, 2002 Hearing. By this, the district court apparently meant that the plaintiffs' claims could not be adjudicated on the basis of the administrative record or supplemental declarations filed by the government because of what the court chose to accept as an ever-present *possibility* of irregularities (unsupported by any specific evidence in this case).

This approach reverses the normal presumption of regularity accorded to government action. *See United States Postal Service* v. *Gregory*, 122 S. Ct. 431, 436 (2001); *American Federation of Government Employees, AFL-CIO* v. *Reagan*, 870 F.2d 723, 727-28 (D.C. Cir. 1989). It is that presumption, not a generalized speculation that "the government doesn't always comply with the law," App. 217, that governs extra-record discovery into even routine agency action. As the Supreme Court and this Court have explained, "*in the absence of clear evidence to the contrary*, courts presume that [public officers] have properly discharged their official duties." *United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15 (1926) (emphasis added); *Morris* v. *Sullivan*, 897 F.2d 553, 560 (D.C. Cir. 1990) (same). And that presumption, in turn, ordinarily precludes discovery into the inner workings of the Executive Branch. *See United States* v. *Armstrong*, 517 U.S. 456, 463-65, 468-70 (1996). That must especially be so with respect to a group consisting of the Heads of Departments and close presidential advisers who have been directed by the President himself to prepare advice for him on important policy initiatives.

Thus, in an APA action, a plaintiff may not, for example, demand access to the calendar and phone log of an agency decisionmaker merely by alleging that the decisionmaker might have engaged in *ex parte* contacts. As this Court has explained, extra-record discovery against an agency is warranted only where a plaintiff makes "a 'strong showing of bad faith or improper behavior' or when the record is so bare that it prevents effective judicial review." *Commercial Drapery Contractors, Inc.* v. *United States*, 133 F.3d 1, 7 (D.C. Cir. 1998) (quoting *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971)); *Community for Creative Non-Violence* v. *Lujan*, 908 F.2d 992, 997 (D.C. Cir.1990); *see also National Nutritional Foods Ass'n* v. *FDA*, 491 F.2d 1141, 1145 (2d Cir.) (Friendly, J.) ("strong preliminary showings of bad faith have been required * * * before the taking of testimony has been permitted with regard to internal agency deliberations"), *cert. denied*, 419 U.S. 874 (1974). Thus, even in cases presenting significant allegations of agency misconduct, this Court has remanded the matter to the agency rather than allow discovery. *See Professional Air Traffic Controllers Organizati on (PATCO)* v. *FLRA*, 672 F.2d 109, 113 (D.C. Cir. 1982) (remanding to agency to develop record on whether there were improper *ex parte* contacts with agency official).

In urging extensive discovery, plaintiffs relied on the part of *AAPS* that remanded a FACA case for expe-

dited discovery concerning a working group formed to gather information and develop alternative policy options for the Task Force on National Health Care Reform established by President Clinton. *See* 997 F.2d at 901, 915-16. However, the Court in that case did not consider the source of a cause of action to enforce FACA, which this Court only later indicated is the APA, *Claybrook* v. *Slater*, 111 F.3d 904, 908-909 (D.C. Cir. 1997), and it accordingly did not consider the scope of discovery properly available in an APA action. Nor is the factual posture of that case similar to that of this action. In *AAPS*, the government's own submissions raised genuine questions as to whether the working group at issue was, in fact, composed of government officers and employees, *see* 997 F.2d at 914-15 (noting government's acknowledgment that participants in the working group's meetings included "special government employees" and "consultants"), and whether the group lacked the formality and structure of an advisory committee, *id.* at 914. No comparable questions have been raised here. Moreover, the Court in *AAPS* did not provide for proceedings on remand on any question concerning the President or Vice President or the membership of the task force itself, once the *legal* status of the First Lady's conceded role was resolved. Only subsidiary matters concerning staff-level participation by outsiders in actual deliberations was involved. Finally, although the Court's decision referred to expedited discovery, it would have been open to the government to argue on remand that, at least in the first instance, the factual questions should have been resolved by further government submissions.[4]

[4] The *AAPS* FACA claim was subsequently mooted when, after the working group became defunct, the government made its documents available for inspection. *See AAPS*, 187 F.3d at 659.

C. By Declining To Follow Established Procedures, The District Court Has Brought To The Fore The Substantial Constitutional Questions It Sought To Avoid.

The substantial constitutional questions raised by discovery into the efforts of the Vice President and a group of senior presidential advisors reporting directly to the President to advise the President in the exercise of his core Article II powers underscore the need for a strict application of the need for and limitations on discovery that would obtain even in a garden variety APA action.

The NEPDG was established by the President, chaired by the Vice President with the active participation of Cabinet officers and other high-ranking federal officials, and charged with providing advice and recommendations directly to the President. As the Supreme Court and this Court have recognized, application of the FACA to similar committees raises serious constitutional questions. In *Public Citizen*, the Supreme Court recognized that application of the FACA to an American Bar Association committee that made reports for the Attorney General on prospective judicial nominees "would present formidable constitutional difficulties." *Id.* at 466. *See also id.* at 488-89 (Kennedy, J., concurring) (holding that application of the FACA would be unconstitutional). In *AAPS*, this Court likewise recognized that applying the FACA to a task force that operated in close "operational proximity to the President himself" would raise a "difficult constitutional issue," and construed the FACA to avoid that constitu-

tional question. *Id.* at 909-10. *See also* 924-25 (Buckley, J., concurring) (FACA would be unconstitutional as applied).

Those principles counsel, *a fortiori*, in favor of restraint in this case. While the ABA committee in *Public Citizen* concededly involved individuals outside the government, and the task force in *AAPS* involved the First Lady and an ambiguous group of outside participants, here there is no basis in the record to suspect a committee made up exclusively of high-level presidential advisers, in fact involved any "unofficial," non-governmental members. If the mere allegation of an unofficial, non-governmental member is enough to trigger discovery obligations roughly co-extensive with the available remedies for a FACA violation, then the textual exemption of advisory groups including only government officials, which presumably was designed to protect against undue interference with executive functions, has little practical effect. In that event, the constitutional problems this Court and the Supreme Court have sought to avoid are, in reality, unavoidable. Those problems are avoidable, however, by limiting discovery in accordance with ordinary APA principles of review.

The district court adopted a different theory of constitutional avoidance. It believed that it could avoid deciding whether the FACA could constitutionally be applied to the NEPDG by ruling on statutory grounds. *See* App. 170-94. Had the court done so in accordance with established principles of judicial review of Executive action, that would be an unexceptionable course, and the case would have been dismissed. As the administrative record makes clear, FACA has no application to this all-government committee. Instead, the court

approved intrusions into the operations of the Presidency and Vice Presidency that extend far beyond what would result if the FACA were held applicable. In important respects plaintiffs would obtain greater disclosure through discovery than they would obtain if they prevailed on the merits of their suit. FACA provides for notice of meetings, that such meetings be open, and that records of the advisory committee be publicly available to the extent not exempt from disclosure under FOIA. Plaintiffs' discovery requests seek information about communications between individual NEPDG members outside the context of group meetings, between NEPDG members and agency personnel, and between NEPDG members and outside individuals—none of which would be available under FOIA. *See, e.g.*, App. 246, Request for Production No. 3; App. 251, 253, Plaintiffs' First Set of Interrogatories, ¶ B and Interrogatories Nos. 3, 4.

The district court erred in concluding that these intrusions should be permitted because the President may assert executive privilege to prevent disclosure of certain information. A President should not be forced to "consider the privilege question" in response to unnecessarily broad or otherwise improper discovery. *United States* v. *Poindexter*, 727 F. Supp. 1501, 1504-06 (D.D.C. 1989). Neither *Public Citizen* nor *AAPS*, which recognized the significance of the constitutional issues presented by requiring disclosure, involved information with respect to which the government had asserted executive privilege. Those decisions recognize that the intrusions on the Executive from FACA are not eliminated by the potential to assert executive privilege. That is equally true of the intrusions allowed

by the wide-ranging discovery authorized by the district court.

That constitutionally problematic intrusion could have been avoided if the district court had appreciated the consequences of its determination that this case was an APA action. Alternatively, those consequences could have been avoided by requiring a heightened showing of need for discovery of the President's closest advisers. *See Poindexter*, 727 F. Supp. at 1504-06; *Dellums* v. *Powell*, 561 F.2d 242, 245-249 (D.C. Cir. 1977). As the district court itself recognized, transformation of the FACA into a vehicle by which to obtain extensive discovery regarding the operations of a group chaired by the Vice President and operating in close proximity to the President raises many of the same concerns underlying those decisions, whether or not privilege may be asserted for particular communications. App. 171-72. The Constitution and principles of comity preclude discovery of the President or Vice President, especially without a demonstration of compelling and focused countervailing interest. In this case, the only interest asserted in plaintiffs' lawsuit is a generalized interest in disclosure to the public at large as an end in itself, and wide- ranging and intrusive discovery is sought only in and of that end. Such a generalized interest is wholly insufficient to warrant application of the FACA to a group in such close proximity to the President, much less to warrant the broad discovery plaintiffs seek. Nor have plaintiffs made the sort of threshold evidentiary showing that the NEPDG was not actually constituted as the President directed

that would be necessary in any event to allow review other than that limited to an administrative record.[5]

III. THE VICE PRESIDENT SHOULD BE DISMISSED AS A PARTY.

As plaintiffs conceded, App. 148, the President and Vice President are not "agencies" subject to the APA, *see Franklin* v. *Massachusetts*, 505 U.S. 788, 800-01 (1992), and that statute provides no basis for review of the President's actions in establishing the NEPDG or of the Vice President's actions in chairing the group. The district court believed, however, that the actions of the Vice President might be subject to review by way of mandamus. App. 169. That conclusion is flawed for several reasons.

First, although review of the President's actions for alleged constitutional violations is not foreclosed, the traditional means for obtaining such review is to sue the subordinate officials charged with their implementation. *See, e.g., Dalton* v. *Specter*, 511 U.S. 462, 464 (1994); *Franklin*, 505 U.S. at 790 (suit against Secretary of Commerce); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 584 (1952) (same); *Chamber of Commerce* v. *Reich*, 74 F.3d 1322, 1325 (D.C. Cir. 1996) (suit against Secretary of Labor). As Justice Scalia has explained, official-capacity suits directly against the "principals" of Article I and Article II would raise profound separation of powers concerns. *See Franklin*, 505

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[5] Indeed, as this Court has made clear, principles of comity require strict limitations on discovery from all high-ranking executive branch officials. *See Simplex Time Recorder Co.* v. *Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985), *cert. denied*, 510 U.S. 989 (1993); *In re Minister Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998).

U.S. at 827-29 (opinion concurring in part and concurring in the judgment); *id.* at 829 ("Unless the other branches are to be entirely subordinated to the Judiciary, we cannot direct the President to take a specified executive act or the Congress to perform particular legislative duties."). For these purposes, the Vice President—one of only two officers of the United States explicitly mentioned in Article II—is not meaningfully distinguishable from the President, especially where the suit concerns actions of the Vice President in assisting the President in the performance of his constitutionally assigned duties, see 3 U.S.C. § 106, including the core Article II functions vested exclusively in the President under the Recommendations and Opinion Clauses of the Constitution. Nothing in the Supreme Court's cases suggests that these principles may be circumvented by naming the President or Vice President on some alternative theory of judicial review.

Second, this Court's cases involving nonstatutory review of Presidential action provide no support for the district court's belief that the Vice President could be named as a defendant or that the claim in this case falls into any recognized category of nonstatutory review. This Court has, in limited circumstances, concluded that review of actions of the President may be available, in suits directed at the appropriate subordinate officials, where the President is alleged to have acted outside his authority. *See Chamber of Commerce*, 74 F.3d 1322 at 1327-28. Plaintiffs' allegations that some NEPDG members may have had discussions with nongovernment employees (which would be irrelevant to the applicability of FACA and entirely improper in any event) cannot plausibly be construed to fall within that narrow category of nonstatutory review. *See, e.g., Leedom* v.

Kyne, 358 U.S. 184, 188-91 (1958); *Griffith* v. *FLRA*, 842 F.2d 487, 493 (D.C. Cir. 1988) ("The *Leedom* v. *Kyne* exception is intended to be of extremely limited scope * * *. The Supreme Court and others have sought to confine it to agency error so extreme that one may view it as jurisdictional or nearly so.") (citations omitted); *ibid.* ("review may be had only when the agency's error is patently a misconstruction of the Act * * * or when the agency has disregarded a specific and unambiguous statutory directive") (internal quotation marks and citations omitted); *United States Dep't of Justice* v. *FLRA*, 981 F.2d 1339, 1343 (D.C. Cir. 1993) ("'garden-variety' error of law is not sufficient to bring the Authority's order within the narrow bounds of the *Kyne* exception").

Finally, any suggestion in this Court's cases that nonstatutory review is freely available to enforce a federal statute must be read in light of the Supreme Court's recent decisions addressing judicially implied rights of action and efforts to use broad writs to circumvent particular limits on jurisdiction. As the Supreme Court has explained, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). Thus, a plaintiff who seeks to invoke an implied private right of action under a federal statute "must show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'" *Gonzaga Univ.* v. *Doe*, 122 S. Ct. 2268, 2276 (2002) (quoting *Sandoval*, 532 U.S. at 286). Here, the FACA does not provide a distinct remedy and so it is enforceable, if at all, through the APA. The APA limits review to the administrative record and does not reach the Vice President. The more general writ of manda-

mus cannot be used to circumvent those limits on the provision directly providing for review of administrative action. *Cf. Syngenta Crop Protection, Inc.* v. *Henson*, 2002 WL 31453983 (Nov. 5, 2002).

The FACA reveals no congressional intent whatsoever to create judicially enforceable private rights and remedies beyond those available under the APA, which pointedly does not authorize suits against or apply to actions of the President or Vice President. As the Supreme Court and this Court have recognized, application of the FACA to the President and groups in operational proximity to the President raise significant constitutional questions. No basis exists for concluding that the Vice President can be a proper defendant in a suit, by mandamus or otherwise, concerning the application of that statute.

Even where the mandamus statute applies, the granting of mandamus relief is equitable in nature. Where, as here, an ultimate award of mandamus relief on the merits would raise substantial constitutional questions, those same equitable considerations require the conclusion that a court may order discovery in aid of the possibility of such relief—where review of a record compiled by the Executive Branch would otherwise be the norm—only in the most extraordinary circumstances. No such circumstances are present here.

CONCLUSION

For the foregoing reasons, this Court should exercise its jurisdiction under 28 U.S.C. § 1651, vacate the discovery orders issued by the district court, direct the

court to decide the case on the basis of the administrative record and such supplemental affidavits as it may require, and direct that the Vice President be dismissed as a defendant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November 2002, I am causing the foregoing EMERGENCY Petition for Writ of Mandamus to be served on the following in the manner specified:

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-
[Civil Action Nos. 01-1530, 02-631[EGS]

IN RE RICHARD B. CHENEY,
VICE PRESIDENT OF THE UNITED STATES, *ET AL.*,
PETITIONERS

EMERGENCY MOTION FOR STAY PENDING APPELLATE REVIEW

The Vice President of the United States, Assistants to the President Joshua Bolten and Lawrence Lindsey, the former National Energy Policy Development Group ("NEPDG"), and former NEPDG Executive Director Andrew Lundquist, who are all defendants in these consolidated cases, respectfully ask this Court for an immediate stay pending review by this Court of the district court's orders permitting discovery against them.

Together with this motion, we are filing a Petition for Writ of Mandamus. The Vice President has separately filed a notice of appeal on November 8, 2002, appealing the court's rulings as of right under 28 U.S.C. § 1291. *See United States* v. *Nixon*, 418 U.S. 683 (1974). The district court denied a stay pending appellate review on November 1, 2002.

Plaintiffs in these actions allege that the NEPDG, an Executive Branch advisory group established by President Bush and headed by Vice President Cheney, operated in violation of procedures established by the Federal Advisory Committee Act ("FACA"), 5 U.S.C.

Appendix 2. As the President's directive establishing the group and the group's final report both make clear, however, the NEPDG consisted wholly of full-time government officers and employees and is therefore exempt from FACA.

Nevertheless, based on the conclusory allegation that someone outside the government might have been accorded membership, the district court has ordered far-ranging discovery into the workings of the group, despite its operational proximity to the President. That discovery includes sweeping interrogatories and document requests to the Vice President and involves intrusions on the Executive far beyond the information that would be disclosed if FACA actually applied.

As we explain in our mandamus petition, the district court committed clear error in permitting this wide-ranging and constitutionally problematic discovery based on mere allegations that the NEPDG had members other than those specified by the President. In particular, the district court erred in refusing to decide this case on the administrative record in accordance with established law; in approving discovery into the workings of a presidentially appointed committee of top-level government officials and into the Office of the Vice President; and in refusing to dismiss the Vice President from this lawsuit. Under the district court's schedule, defendants must respond to plaintiffs' discovery requests by November 29, 2002.

Absent an immediate stay, the government will be unable to obtain effective review of the district court's order. Indeed, compliance with the district court's discovery orders against these defendants will moot their claims that such orders are statutorily impermissible and unconstitutional. Moreover, absent an appellate

decision clarifying that mere allegations concerning "unofficial" members cannot authorize wide ranging and constitutionally problematic intrusions into the Executive Branch, there is a continuing and irreparable chill on the use of committees of Cabinet officers or other top-level officials to advise the President. Accordingly, to permit orderly appellate review, avoid these irreparable injuries, and promote interbranch comity, we respectfully ask that this Court grant an emergency stay pending appellate review.

STATEMENT

President Bush established the NEPDG as an entity within the Executive Office of the President in a memorandum dated January 29, 2001. App. 117. The NEPDG's mission was to "develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State, and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy." App. 118. The NEPDG was given no operational or administrative responsibilities; rather it was directed to "gather information, deliberate, and, as specified in this memorandum, make recommendations to the President." *Ibid.*

The President directed that the NEPDG consist exclusively of government officers and employees and be chaired by the Vice President. App. 117-18. As the group's final report makes clear, the group was, consistent with the President's directive, composed exclusively of federal officers and employees. *See Reliable, Affordable, and Environmentally Sound Energy For America's Future: Report of the National Energy*

Policy Development Group ("Report") (available at www.whitehouse.gov/energy).

The Supreme Court has gone to great lengths to impose limits on the FACA to maintain its constitutionality. *See Public Citizen* v. *Department of Justice*, 491 U.S. 440 (1989). The FACA itself has a statutory limitation that limits potential unconstitutional intrusions on the Executive: it does not apply to committees that are composed entirely of "full-time, or permanent part-time, officers or employees of the Federal Government," 5 U.S.C. App. 2 § 3(2). The district court nevertheless denied the government's motion to dismiss plaintiffs' complaints, reasoning that it was sufficient for plaintiffs to allege that the President's specification of the group's membership and the group's own confirmation of its membership, as reflected in formal administrative documents, was inaccurate. App. 151-52. The court then denied the government permission to file a motion for summary judgment, concluding that the case should not be decided on the basis of an administrative record. App. 173. The court also refused to dismiss the Vice President as a party, choosing instead to assume for purposes of further proceedings that mandamus review of his actions might be available at the end of the day. App. 169.

The court then approved a broad discovery plan that allows production of documents and information far beyond what would be obtained on the merits if plaintiffs ultimately prevailed on their FACA claim. App. 238. These include communications between individual NEPDG members outside the context of group meetings, between NEPDG members and agency personnel, and between members and outside individuals. *See, e.g.*, App. 246, Request for Production No. 3; App. 251,

253, Plaintiffs' First Set of Interrogatories at 2, ¶ B, and Interrogatories Nos. 3, 4.

The government sought a protective order with respect to discovery against the Office of the Vice President and urged the district court to consider a motion for summary judgment and rule on the basis of the administrative record in accordance with established APA procedure. In addition, the government submitted a declaration of Karen Knutson, the Deputy Assistant to the Vice President for Domestic Policy and former Deputy Executive Director of NEPDG, who detailed attendance at all meetings of the NEPDG and of a so-called "Staff Working Group." App. 257. Ms. Knutson's affidavit confirmed that all members of the NEPDG, and persons who attended the NEPDG's meetings, were government officers or employees. She also explained that all participants in the staff group were government employees, with the exception of one communications consultant who provided technical, non-substantive assistance to the staff group and who attended only minor portions of several of the numerous meetings that the other members of the staff had. *See* App. 261-62, Declaration of Karen Y. Knutson, ¶¶ 10, 13.

The court denied the government's motion and declined to allow the government to file a motion for summary judgment. App. 264. The court denied the government's motion for a stay pending appellate review on November 1, 2002, App. 371, and has ordered that the government comply with the discovery requests by November 29, 2002, App. 372.

REASONS WHY A STAY SHOULD BE GRANTED

Under the familiar stay standards, a Court must consider the movant's likelihood of success on appeal, the balance of harms and the public interest. *Washington Metro. Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). "A stay may be granted with either a high probability of success and some injury, or vice versa." *Cuomo* v. *United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985). Where the movant has established substantial irreparable harm and the balance of harms weighs heavily in its favor, it need only raise "serious legal questions going to the merits" to obtain a stay pending appeal. *Population Inst.* v. *McPherson*,797 F.2d 1062, 1078 (D.C. Cir. 1986) (quoting *Washington Metro. Area Transit Comm'n*, 559 F.2d at 844); *see also Providence Journal Co.* v. *Federal Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979) (where "the denial of a stay will utterly destroy the status quo, irreparably harming appellants, but the granting of a stay will cause relatively slight harm to appellee, appellants need not show an absolute probability of success in order to be entitled to a stay").

The government has a substantial likelihood of prevailing on appeal and in its request for mandamus relief. In addition, its ability to obtain meaningful appellate review will be vitiated absent a stay. Moreover, the decision below permits substantial interference with intra-Executive Branch efforts to advise the President and so interferes with such efforts in a manner clearly contrary to the public interest.

I. Probability of Success On the Merits.

As detailed further in our petition, the district court's order finds no basis in FACA and contravenes fundamental principles of administrative law and interbranch comity. Even in the context of meetings concededly involving *non*-governmental personnel who offer advice to the President, the Supreme Court has adopted a construction of FACA that this Court described as "extremely strained," *Association of American Physicians & Surgeons, Inc.* v. *Clinton*, 997 F.2d 898, 906 (D.C. Cir. 1993), in order to avoid an unconstitutional interference with efforts to advise the President in the discharge of his core Article II powers. FACA's textual exemption of committees made up exclusively of governmental officials is even more critical in avoiding unconstitutional interference with the Executive. Nevertheless, the decisions below eliminate this key textual protection as a practical matter by allowing discovery of material that not only duplicates but goes well beyond the information that would be made public if FACA actually applied to the group—all upon the mere allegation that, contrary to the President's express directive, there was a non-governmental member of the committee. The correct application of traditional principles of judicial review avoids this constitutionally problematic result. However, the decisions below disregard this principle.

As the district court properly recognized, the FACA confers no private right of action. An action alleging that federal officials failed to comply with the FACA must ordinarily proceed under the APA. The APA does not apply to the President or Vice President, but the district court concluded that it might have authority to review the Vice President's exercise of his

presidentially assigned responsibilities concerning the NEPDG under the mandamus statute. But the district court erred in its application of the APA and mandamus, by assuming mandamus review would be available at all with respect to the Vice President in a case such as this. Judicial review in either case is limited to the administrative record. *See, e.g., Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985); *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam).[1] The President and Executive Branch agencies routinely create intragovernmental working groups and task forces to address a broad range of issues. Neither the FACA nor the APA contemplates discovery into the workings of these groups based on bare assertions that the groups should have been established under FACA.

The error of permitting such discovery is particularly clear when a policy group, led by the Vice President, is established by the President from among the Heads of Departments and his closest advisors to report directly to him in the conduct of core executive functions. Permitting discovery into the conversations and contacts of that group, including the Vice President himself, and conversations between individual members of the group and outsiders, constitutes a significant intrusion raising serious constitutional concerns. In particular, the Vice President of the United States respectfully but resolutely maintains, in the circumstances of this case, that

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[1] A plaintiff cannot circumvent the limitations on APA review by stating a parallel claim for mandamus. Indeed, the principle of confining review to the administrative record predates the APA, *see Texas Rural Legal Aid, Inc.* v. *Legal Services Corp.*, 940 F.2d 685, 698 (D.C. Cir. 1991), and thus governs claims for mandamus as well.

extending the legislative and judicial powers to compel a Vice President to disclose to private persons the details of the process by which a President obtains information and advice from the Vice President raises separation of powers problems of the first order.

The district court's premise in permitting discovery was that "the government doesn't always comply with the law." App. 217 (Tr. of Aug. 2, 2002 Hearing). By this, the district court apparently meant that plaintiffs' claims could not be adjudicated on the basis of the administrative record or supplemental declarations filed by the government because of what it regarded as an ever-present *possibility* of irregularities (unsupported by any specific evidence in this case). This stands established principles on their head. Agency proceedings are accorded a presumption of regularity, and allegations of bad faith justify discovery only upon a strong preliminary showing that misconduct has occurred. *See United States Postal Service* v. *Gregory*, 122 S. Ct. 431, 436 (2001); *United States* v. *Armstrong*, 517 U.S. 456, 463-65, 468-70 (1996); *American Federation of Government Employees, AFL-CIO* v. *Reagan*, 870 F.2d 723, 727-28 (D.C. Cir. 1989). That showing plainly has not been made here, and the court's departure from settled law constitutes manifest and significant error.

The district court compounded this error by allowing discovery of the Vice President and others with the closest proximity to the President, especially where the plaintiffs have not made any attempt to demonstrate a substantial need for that discovery. Erroneously concluding that defendants "have cited no authority" to support their argument, the district court ignored authority, cited to the district court by defendants, in

which courts have, in fact, required such a substantial showing of need before permitting discovery against the highest reaches of the Executive Branch. *See United States* v. *Poindexter*, 732 F. Supp. 142, 147 (D.D.C. 1990) (applying the "particularly meticulous" standard to require a showing of need prior to the invocation of privilege with respect to a request for presidential testimony); *United States* v. *Poindexter*, 727 F. Supp. 1501, 1503-06 (D.D.C. 1989) (applying similar requirement for document subpoena).[2]

The district court's error is further compounded by its refusal to dismiss the Vice President as a party. The Vice President is not an "agency" within the meaning of the APA, and the scope of non-statutory review recognized by this Court does not extend either to actions directly against the Vice President or to the type of error alleged in this case.[3]

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[2] Defendants also cited cases in related contexts in which the Supreme Court and other circuit courts have applied a strict "need" standard before allowing discovery against the Executive Branch or where potentially privileged material was involved. *United States* v. *Armstrong*, 517 U.S. 456 (1996) (requiring plaintiffs to demonstrate need before permitting discovery against federal prosecutors on selective prosecution theory); *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982) (requiring plaintiffs to make threshold demonstration before allowing discovery on qualified immunity claim). *See also United States* v. *Cuthbertson*, 630 F.2d 139, 148 (3d Cir. 1980) (requiring demonstration of need where potentially privileged documents implicated by discovery request) (cited in *Poindexter*, 727 F. Supp. at 1505 n.8).

[3] Indeed, the Supreme Court recently ruled that a plaintiff who seeks to invoke an implied private right of action under a federal statute "must show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'" *Gonzaga Univ.* v. *Doe*, 122 S. Ct. 2268, 2276 (2002) (quoting *Alexander* v.

The district court itself repeatedly recognized that the questions presented here "are very important," App. 299 (Tr. of Oct. 17, 2002 Hearing). *See also* App. 323 (Tr. of Oct. 31, 2002 Hearing (recognizing that "this is a very important case")); App. 171 (July 11, 2002 Opinion (recognizing "the seriousness of the constitutional challenge raised by defendants to the application of the FACA")). Nonetheless, the district court denied the moving defendants' motion for a stay on the ground that they have no likelihood of success. App. 366-68 (November 1, 2002, Order). The court's conclusion is inconsistent with its own prior pronouncements and erroneous.

II. Balance of Harms and The Public Interest.

Absent a stay, the government will be unable to obtain meaningful appellate review of the serious constitutional and statutory issues implicated by the court's rulings. The district court itself recognized that "if defendants' premise is accepted [by the Court of Appeals] that compliance with this Court's discovery order imposes an unconstitutional burden, defendants would suffer irreparable harm if the proceedings before this Court were not stayed to enable them to seek appellate review of such an order." App. 369-70 (November 1, 2002 Order at 6-7). The grant of a stay is essential to maintain the appellate court's ability to exercise its proper authority over lower court rulings—"perhaps

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Sandoval, 532 U.S. 275, 286 (2001). Where, as here, the underlying statute does not create a private right of action, and where the statute that *does* furnish a right of action to enforce the FACA—namely, the APA—does not apply to the President or Vice President, the federal mandamus statute cannot provide a means of enforcement of the FACA.

the most compelling justification" for the grant of a stay. *John Doe Agency* v. *John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers, granting stay as Circuit Justice for the Second Circuit). *See also Providence Journal Co.* v. *FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (because "[m]eaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable," an appellate court should normally grant such a stay, if the issues raised are substantial, to prevent confidentiality from being "lost for all time").

More broadly, the decision below injures the Executive Branch and the public interest by chilling intra-Executive Branch efforts to advise the President. The decision below has the practical effect of eliminating FACA's textual exemption of committees made up solely of governmental officials. It allows any litigant to trigger discovery that is largely duplicative of or even more intrusive than the remedies for a FACA violation —both in scope and constitutional difficulty—based on a mere allegation of unofficial members distinct from the membership prescribed by the President.

We ask that a stay be entered at the earliest possible time. Complying with plaintiffs' requests imposes a significant burden on the Vice President and officials in his office and entails the very intrusion into the Presidency and the Vice Presidency that the Vice President and other defendants seek to have adjudicated as unconstitutional and otherwise unwarranted. These officials should not be distracted from their responsibilities, nor suffer the very harms that they seek on appeal to have adjudicated as unconstitutional and otherwise unwarranted, unless and until this Court approves the district court's determination to permit discovery.

Conversely, plaintiffs will experience no harm as a result of a stay. We are seeking highly expedited review in this Court, and any delay resulting from the stay will be minimal. Similarly, the public interest will be best served if this court stays, pending appellate adjudication, the lower court's orders, which entail substantial burdens on and distraction of high-level, and which effect the very type of intrusion into the functioning of the Presidency and the Vice Presidency that defendants seek to have this Court adjudicate on appeal.

CONCLUSION

For the foregoing reasons, this Court should stay discovery in this case pending appellate review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November 2002, I am causing the foregoing EMERGENCY Motion for A Stay Pending Appellate Review to be served on the following in the manner specified:

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 01-1530 (EGS)
JUDICIAL WATCH, INC., PLAINTIFF
v.
NATIONAL ENERGY POLICY DEVELOPMENT GROUP, DEFENDANT

Civ. Action No. 02-631 (EGS)
SIERRA CLUB, PLAINTIFF
v.
VICE PRESIDENT RICHARD CHENEY, IN HIS OFFICIAL CAPACITY, ET AL., DEFENDANTS

MEMORANDUM OPINION AND ORDER

Pending before this Court is non-agency defendants' motion for certification of interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Upon careful consideration of this motion, the responses and reply thereto, the applicable statutory and case law, and for the following reasons, the defendants' motion is hereby **DENIED.**

I. BACKGROUND

Defendants Vice-President Richard B. Cheney, the National Energy Policy Development Group "NEPDG"), Andrew Lundquist, Joshua Bolten, and

Larry Lindsay[1] have recently filed with the United States Court of Appeals for the District of Columbia Circuit a series of appeals of this Court's July 11, 2002, August 2, 2002, September 9, 2002, October 17, 2002, and November 1, 2002 Orders.

On November 7, 2002, defendant Vice-President Richard Cheney filed a notice of appeal of this Court's November 1, 2002, October 17, 2002, and September 9, 2002 Orders approving discovery of him by plaintiffs. These Orders, *inter alia*, require him to produce non-privileged documents responsive to plaintiffs' First Request for Production of Documents or file detailed and precise objections to particular requests with the Court. The defendant was also directed to produce a privilege log identifying with specificity the documents or categories of documents withheld pursuant to an asserted privilege, as well as the grounds therefor. Mr. Cheney appeals these Orders as "final orders" under what defendants have dubbed the "Nixon rule." Defs.' Mot. at 3. Defendant premises the Court of Appeals' jurisdiction for such an appeal on the Supreme Court's ruling in *United States* v. *Nixon* deeming a discovery Order denying a motion to quash a subpoena *duces tecum* directed to the President of the United States a "final order" for the purpose of bringing its appeal within the reach of 28 U.S.C. § 1291. *United States* v. *Nixon*, 418 U.S. 683, 690-92, 94 S. Ct. 3090, 3098-99 (1974). This narrow rule was adopted by the *Nixon* Court to avoid the "unseemly" circumstance in which

[1] For ease of reference, these individuals will be referred to throughout this opinion as either "non-agency defendants," or "defendants," to distinguish them from the federal agency defendants who have not joined in this motion.

the President of the United States would be forced to disobey the Judicial Branch to obtain appellate review of its orders. *Id.* at 692.

The so-called "Nixon rule" appears to have been applied only in *United States* v. *Nixon*, and defendants seem to concede that it has never been applied to the Office of the Vice-President. *See* Defs.' Reply in Supp. of Mot. for a Stay at 3. Mr. Cheney argues for an extension of *Nixon*'s holding to this case, contending that the underlying rationale applies with equal force to the Vice-President, rendering this Court's discovery Orders "final orders" subject to appellate review pursuant to § 1291, at least as applied to Vice-President Cheney. *Id.*

Additionally, on November 12, 2002, all five non-agency defendants filed an Emergency Petition for Writ of Mandamus with the Circuit Court, seeking review of this Court's Orders authorizing discovery of them. Defendants allege that these Orders reflect "clear error" on this Court's part, and urge the Court of Appeals to order this Court to dismiss Vice President Cheney from this action, and to decide this case on the basis of the administrative record alone, without the benefit of further discovery. Emergency Mot. for Stay at 2; Emergency Pet. for Writ of Mandamus at 1, 8.

Notwithstanding this flurry of appellate activity, non-agency defendants have also filed a motion before this Court to certify three issues for interlocutory appeal to the United States Court of Appeals for the D.C. Circuit. Defendants argue that they are entitled to pursue all three avenues of appeal, but urge this Court to grant their motion for certification pursuant to § 1292(b) in order to afford the Court of Appeals "more options to consider in determining whether and how

. . . it is going to take the case, because interlocutory appeal would be a more traditional way for the Court to examine the issues rather than the Nixon theory or mandamus." Tr. 11/13/02 Hr'g. at 28:22 - 29:5; Defs.' Reply in Supp. of Mot. for Stay at 2-4. However, as plaintiffs correctly point out, convenience alone is not a ground for granting certification under § 1292(b). *See* Tr. 11/13/02 Hr'g. at 33:11 - 33:17. A party must establish a factual and legal predicate under the standard set forth in 28 U.S.C. § 1292(b) in order for a question to be properly certified for interlocutory appeal, a prerequisite defendants have failed to satisfy in this case.

II. MOTION FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 1292(b)

Defendants contend that they are entitled to certification of this Court's July 11, 2002, August 2, 2002, September 9, 2002, and October 17, 2002 Orders for immediate appeal pursuant to 28 U.S.C. § 1292(b) to resolve the following questions of law:

> 1) whether the Federal Advisory Committee Act ("FACA") is enforceable against the Vice President through an action for *mandamus*;
>
> 2) whether a private plaintiff may obtain discovery of the Vice President and other non-agency defendants in a civil case "absent any showing of need;"
>
> 3) whether, "in light of principles of judicial review established by the Administrative Procedure Act ("APA"), and in light of the constitutional concerns raised by plaintiffs' suit and requests for discovery, this case should be dismissed or resolved on the basis of the administrative record."

Defs.' Mot. for Certification at 2.

A. Standard of Review

A District Court may certify an interlocutory order for immediate appeal if it concludes that it

> involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation.

28 U.S.C. § 1292(b); *Trout* v. *Garrett*, 891 F.2d 332, 335 n.5 (D.C. Cir. 1989). Through § 1292(b), "Congress . . . chose to confer on District Courts first line discretion" and "circumscribed authority to certify for immediate appeal interlocutory orders deemed pivotal and debatable." *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 46, 47, 115 S. Ct. 1203, 1210 (1995).

In an opinion relied upon by both parties, the Seventh Circuit described a "controlling" question of law as one which

> will determine the outcome or even the future course of the litigation . . . a question is controlling, even though its decision might not lead to reversal on appeal, if interlocutory reversal might save time for the district court, and time and expense for the litigants.

Johnson v. *Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991). One District Court within this Circuit has held:

> Under section 1292(b), a controlling question of law is one that would require reversal if decided incorrectly or that could materially affect the course

> of litigation with resulting savings of the court's or the parties' resources.

In re Vitamins Antitrust Litigation, Civ. A. No. 99-197, 2000 WL 673936 at *2 (D.D.C. Jan. 27, 2000).

The threshold for establishing the "substantial ground for difference of opinion" with respect to a "controlling question of law" required for certification pursuant to § 1292(b) is a high one. The parties cite to only one instance within this Circuit in which a court found that it had been met, based on the existence of an apparent inconsistency between a position taken by one panel of the Court of Appeals when remanding to the District Court and that set forth in a prior Circuit opinion. *See Johnson* v. *Wash. Metro Area Trans. Auth.*, 773 F. Supp. 459, 460 (D.D.C. 1991). In another case, not cited by either party, a District Court found that, although the plain statutory language governing a jurisdictional issue could be read consistently with a prior Circuit opinion, certain language in the appellate court opinion "could be seen as in tension with the plain wording of the statute," thereby creating the factual and legal predicates for certification for interlocutory appeal pursuant to § 1292(b). *Carr Park, Inc.* v. *Tesfaye*, 229 F.3d 1192, 1193-94 (D.C. Cir. 2000). In the more traditional case, such as this one, where the party moving for certification pursuant to § 1292(b) disagrees with a court's order denying a motion to dismiss and granting discovery, other District Courts within this Circuit have stated unequivocally that

> Mere disagreement, even if vehement, with a court's ruling on a motion to dismiss does not establish a "substantial ground for difference of opinion" sufficient to satisfy the statutory requirements for an interlocutory appeal.

First Am. Corp. v. *Al-Nahyan*, 948 F. Supp. 1107, 1116 (D.D.C. 1996); *see also In re Vitamins Antitrust Litigation*, 2000 WL 673936 at *3.

A party seeking certification pursuant to § 1292(b) must meet a high standard to overcome the "strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals." *United States* v. *Nixon*, 418 U.S. at 690. "Although courts have discretion to certify an issue for interlocutory appeal, interlocutory appeals are rarely allowed . . . the movant 'bears the burden of showing that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of final judgment.'" *Virtual Def. and Dev. Int'l, Inc.* v. *Republic of Moldova*, 133 F. Supp. 2d 9, 22 (D.D.C. 2001) (quoting *First Am. Corp.* v. *Al-Nahyan*, 948 F. Supp. 1107 (D.D.C. 1996)). The "law is clear that certification under § 1292(b) is reserved for truly exceptional cases." *In re Vitamins Anti-Trust Litigation*, 2000 WL 673936 at *1 (citing *Tolson* v. *United States*, 732 F.2d 998, 1002 (D.C. Cir. 1984)). Defendants have fallen far short of demonstrating that the questions of law presented by the challenged Orders arise under such exceptional circumstances as to warrant disruption of the favored process of appellate review following final judgment.[2]

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[2] It is significant that this Circuit has commented, in *dicta*, that certification pursuant to § 1292 is particularly appropriate "when claims of immunity" are at issue. *McSurely* v. *McClellan*, 697 F.2d

B. Enforcement of FACA against Vice-President through mandamus relief

Defendants contend that "it is appropriate to allow the court of appeals at this time to determine" the question of whether FACA is enforceable against the Vice President by way of an action for *mandamus* because early dismissal of the Vice President from this action would eliminate thorny constitutional issues posed by his presence. *See* Defs.' Mot. for Certification at 7. Defendants further argue that dismissal of the Vice-President, in turn, would "materially advance" the litigation, thus rendering this question a "controlling" one for the purposes of § 1292(b) analysis under the case law cited by both parties. *Id.*

As an initial matter, while dismissal of the Vice-President at this point in the litigation would certainly bring the litigation to a swift conclusion as to this particular defendant, it does not appear that it would eliminate constitutional concerns from this case altogether, nor materially advance the litigation. Defendants have continuously and vehemently contended that discovery is inappropriate as to *all* non-agency defendants, and not just the Vice-President, due to the separation of powers concerns defendants maintain are triggered by any and all discovery of the National Energy Policy Development Group ("NEPDG") and other non-agency defendants. Assuming the nonagency defendants other than the Vice-President do not change

309, 316 n.12 (D.C. Cir. 1982). Nevertheless, given that it is executive privilege, not immunity from suit, which is at issue here, even if this statement were not *dicta*, it still would not bring this case within the realm of "exceptional circumstances" justifying certification for interlocutory appeal.

their position in this regard, dismissal of the Vice-President as a defendant from this case would neither remove nor expedite the resolution of the complex constitutional issues presented.

Moreover, because the Orders defendants seek to certify for appeal concern only discovery reasonably calculated to ascertain whether FACA is even applicable here, it is premature to characterize the question of whether this Court can grant *mandamus* relief ordering compliance with FACA as a "controlling" question of law. Additionally, the Court's July 11, 2002 Memorandum Opinion & Order did not resolve the question of whether *mandamus* relief was available against the Vice-President for a violation of FACA. *Judicial Watch* v. *Nat'l Energy Policy Dev. Group*, Civ. A. No. 01-1530, 2002 WL 1483891 at *21-22 (D.D.C. Jul. 11, 2002). The Court deferred a decision on that issue until it could be ascertained, by means of carefully limited discovery, whether FACA's non-discretionary duties fell exclusively on the Vice-President's shoulders, and, if so, whether issuance of a writ of *mandamus* to him would be an appropriate exercise of this Court's discretion in light of the facts unearthed through discovery. *Id.* Furthermore, "since the controlling question of law ha[s] not yet been resolved by the court . . . [n]o substantial ground for difference of opinion exist[s]." *In re Vitamins Anti-Trust Litigation*, 2000 WL 673936 at *1.

Even if the issue were before the Court at this stage of the litigation, it is quite clear that the question defendants seek to certify is not one as to which, at least in the hypothetical presented in the absence of a more developed factual record, there is "substantial ground for difference of opinion." *See Judicial Watch* v. *Nat'l*

Energy Policy Dev. Group, 2002 WL 1483891 at *21-22 ("Defendants cite no cases in support of their argument . . . [and] ignore[] the Supreme Court's guidance . . ."). Defendants correctly state that *mandamus* review is a "'drastic' remedy, 'to be invoked only in extraordinary situations.'" *Consolidated Edison Co.* v. *Ashcroft*, 286 F.3d 600, 605 (D.C. Cir. 2002). However, the fact that invocation of a procedure is highly unusual does not, in and of itself, create a "substantial ground for difference of opinion" on the question of its potential applicability under certain circumstances. Additionally, precedent from this Circuit has consistently held that *mandamus* relief against Executive Officers, up to and including the President of the United States, is available to enforce performance of non-discretionary statutory duties. *See, e.g., Nat'l Wildlife Fed'n* v. *United States*, 626 F.2d 917, 923 (D.C. Cir. 1980) ("Where a federal official has a clear obligation to perform a ministerial duty, a federal district court may issue a writ of mandamus under 28 U.S.C. section 1361 to compel the fulfillment of the obligation. Mandamus is not precluded because the federal official at issue is the President of the United States."); *Nat'l Treasury Employees' Union*, 492 F.2d 587 (D.C. Cir. 1974). Defendants have not yet established, as a matter of law, that the requisite conditions for *mandamus* relief do not and cannot exist in this case. Accordingly, this Court has held that discovery is necessary to assist in determining whether the particular factual circumstances presented by these cases justify issuance of the writ notwithstanding its "drastic" nature. *See Judicial Watch* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *21-22. Defendants have failed to even suggest that there is a "substantial ground for difference of opinion,"

based on controlling authority, as to the propriety of such a course of action.

Defendants' reliance on cases from other Circuits holding *mandamus* relief to be unavailable where a statute creating a nondiscretionary duty does not provide for a private right of action does not change this result. *See* Defs.' Mot. for Certification at 8. It is not unusual that Circuits differ with respect to the proper resolution of legal issues deemed controlling in a particular case. If interlocutory appeals were to be granted in every such instance, our system's strong preference for appeal only upon final judgment would be severely undermined. Indeed, in view of this Circuit's opinion in *Chamber of Commerce* v. *Reich*, 74 F.3d 1322 (D.C. Cir. 1996), which represents the current, undisputed law of this Circuit, there is no "substantial ground for difference of opinion" on this question for the purposes of § 1292(b) analysis. Even if defendants' assertion that there is a need for further clarification of the limits of *mandamus* review within this Circuit is accepted as true, defendants have offered no reason why such clarification cannot take place upon appellate review after final judgment rather than through the disruptive process of interlocutory appeal. *See* Defs.' Mot. at 8.

Defendants' citation to the recently decided case of *Gonzaga University* v. *Doe* for the proposition that *mandamus* relief is unavailable as a matter of law in this case is equally unpersuasive. See Tr. 11/13/02 Hr'g. at 28:17 - 28:21; Defs.' Mot. for Certification at 8. In *Gonzaga*, the U.S. Supreme Court clarified its precedent with respect to enforcement, through actions brought under 42 U.S.C. § 1983, of conditions placed on receipt of federal funding in federal statutes enacted

pursuant to the Spending Clause. *Gonzaga Univ.* v. *Doe*, ___ U.S. ___, 122 S. Ct. 2268, 2272-75 (2002). *Gonzaga*'s expansion of the discussion in *Alexander* v. *Sandoval*, 532 U.S. 275, 121 S. Ct. 1511 (2001), regarding the recognition of implied private rights of action in the absence of express statutory language or Congressional intent, does not create a "substantial ground for difference of opinion" with respect to the approach adopted by this Court in the present case. *See Gonzaga Univ.* v. *Doe*, 122 S. Ct. at 2277. In fact, this Court expressly followed *Sandoval* in holding that no private right of action can be implied under FACA, thereby adhering to the very line of cases defendants now point to as creating a sufficient basis for interlocutory appeal. *Judicial Watch* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *10-12.

Furthermore, the Supreme Court opinion in *Gonzaga*, at its core, concerned the entirely distinct question of how courts should go about ascertaining whether a personal right triggering the application of 42 U.S.C. § 1983 exists. *Gonzaga Univ.* v. *Doe*, 122 S. Ct. at 2276-77. While instructive, this discussion has little or no appliation to the question of whether a statute creates a non-discretionary duty triggering the potential application of the federal *mandamus* statute, 28 U.S.C. § 1361. Defendants' efforts to equate implied personal rights, or implied rights of action, the subjects of the *Gonzaga* opinion, with an action pursuant to the federal *mandamus* statue for failure to perform a non-discretionary duty created by statute represent, at best, an argument by analogy for extension of the law, and are insufficient to create a "substantial ground for difference of opinion," as that term is used in § 1292(b), justifying immediate resolution of the applicability of the *mandamus* statute in this case.

Defendants have failed to establish the existence of a "substantial ground for difference of opinion" with respect to the question of whether the federal *mandamus* statute offers a means by which FACA could be enforced against the Vice President. Accordingly, certification of this question is inappropriate under § 1292, given the conspicuous absence of one of the policy considerations favoring application of the exceptional procedure of interlocutory review prior to final judgment.

C. Availability of Discovery "Absent Any Showing of Need"

Defendants also contend that the second question for which they seek certification, "whether a private plaintiff may obtain discovery . . . absent any showing of need," is "substantial and controlling," and therefore meets the standard for certification under § 1292(b). Once again, defendants fail to establish the factual and legal predicates for interlocutory appeal of this Court's discovery Orders pursuant to § 1292(b).

As an initial matter, the parties disagree as to whether a District Court's discovery orders are, as a general rule, the proper subject of an interlocutory appeal. Plaintiff Sierra Club contends that they are not, relying on the Eighth Circuit's opinion in *White* v. *Nix*, which suggests that discovery orders "generally never will involve a controlling question of law." *White* v. *Nix*, 43 F.3d 374, 377 (8th Cir. 1994) (citation omitted). In *Nix*, the Eighth Circuit denied, as improvidently granted, review under § 1292(b) of a District Court order requiring production of documents under condi-

tions set out in a protective order. The court held that because the nature and scope of discovery is committed to the sound discretion of the trial court, allegations of abuse of that discretion do not create legal issues or raise the types of legal questions for which interlocutory review pursuant to § 1292(b) would be appropriate. *Id.* Defendants counter that there is no "blanket rule" precluding interlocutory appeal of discovery orders, reasoning that this Circuit has found such orders to be a potentially appropriate subject of the far more drastic remedy of *mandamus*. Tr. 11/13/02 Hr'g. at 30:1 - 30:3; Defs.' Reply at 4, both citing *In re Executive Office of the President*, 215 F.3d 20, 23 (D.C. Cir. 2000) [hereinafter "*EOP*"]. Defendants further argue that interlocutory review is particularly appropriate where, as here, interlocutory orders raise complex and "serious" constitutional issues. Defs.' Mot. at 5; *Cf. EOP*, 215 F.3d at 23 ("disclosure of highly privileged material followed by appeal after judgment is obviously not adequate in such cases—the cat is out of the bag.").

This Court does not dispute that defendants' constitutional challenges to the application of FACA and the APA in this case are "serious." *See Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *22. "Rather, it is out of concern for the seriousness of this issue that this Court has determined that proceeding to discovery is appropriate." *Id.* The Court has held development of the factual record through the discovery ordered in this case necessary to decide the serious issues before it. *Id.* at *31-32.

However, § 1292 jurisprudence does not appear to equate any issue susceptible to a separation of powers argument with a "controlling" question of law as that

language is used in § 1292(b). If an argument, even one that invokes separation of powers doctrine, is without support in existing case law, then the questions of law raised thereby are neither substantial nor controlling for the purposes of § 1292(b) analysis. *See Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *26, 27. Moreover, even if defendants' arguments for a dramatic expansion of the current separation of powers doctrine are ultimately found to be persuasive, § 1292(b) "was not intended merely to provide review of difficult rulings in hard cases." *United States ex rel Hollander* v. *Clay*, 420 F. Supp. 853, 859 (D.D.C. 1976). Defendants' legal arguments, and this Court's rulings on these serious constitutional questions, can just as easily, and more appropriately, be reviewed upon entry of final judgment.

Interlocutory appeal is reserved for "extraordinary cases," and not every case presenting constitutional questions, nor every case permitting discovery requests to be made of Executive Officers, meets this admittedly high standard. *See Clinton* v. *Jones*, 520 U.S. 681, 702, 705, 117 S. Ct. 1636, 1648, 1650 (1997); *EOP*, 215 F.3d at 23. For instance, in *EOP*, the Court of Appeals declined to hear an interlocutory appeal, pursuant to § 1292(b), of the District Court's denial of a motion to dismiss premised on the argument that the Privacy Act did not apply to the Executive Office of the President. *Id.* at 23. In so doing, the Circuit impliedly held that allowing such a case to proceed to discovery and follow established appellate procedures was appropriate notwithstanding the parties involved or the constitutional issues presented. *Id.* The Circuit also denied the government's petition for *mandamus* review of a subsequent discovery order, expressly com-

menting on the sufficiency of appellate review upon final judgment to resolve the "serious" constitutional issues presented. *See* id. at 25.

The Circuit's reasoning in *EOP* is applicable to the motion currently before this Court. In both cases the Executive Branch contends that it is not properly subject to a statute, and that discovery in an action brought to enforce the statute is improper. *See id.* at 21. In *EOP*, defendants had asserted privileges which both the District and Circuit Courts found to be without merit. *Id.* at 22. In the present case, defendants have refused to even review responsive documents and make specific objections and assertions of privilege. Notwithstanding this difference in the underlying facts, in both cases defendants offered "no argument that [they] are even entitled to the privileges." *Id.* at 23-24. Accordingly, these cases are sufficiently analogous for this Court to conclude that there are no "extraordinary circumstances" here requiring resolution on interlocutory appeal.

Additionally, defendants have not succeeded in establishing that there is a "substantial ground for difference of opinion" on the question of whether any discovery requests can be made of presidential advisors or the Vice-President without first showing "any need." As this Court has repeatedly stated, defendants mischaracterize the authority they cite for the proposition that a private party seeking discovery from the Vice-President and presidential advisors must first show a "compelling need," beyond the "mere allegations" sufficient to survive a motion to dismiss, for the information sought. After considerable briefing by all parties, this Court concludes that there is no legal precedent for defendants' position that the discovery procedures

adopted by this Court place an unconstitutional burden on them. Thus, there can be no "substantial ground for difference of opinion" justifying interlocutory appeal on this issue. Moreover, defendants appear to have conceded, both at oral argument on this motion and in their recent briefings, that the real difference of opinion lies between the defendants themselves and the Court, rather than within precedential authority. Tr. 11/13/02 Hr'g. at 30:21 - 30:25. As noted by the District Court in *Al-Nahyan*, "[t]he mere claim that a decision has been wrongly decided is not enough to justify an interlocutory appeal." *First Am. Corp* v. *Al-Nahyan*, 948 F. Supp. at 1117.

Defendants argue that this Court has failed to consider two D.C. District Court opinions which create the requisite "substantial difference of opinion" on the question of whether executive privilege must first be asserted before a party seeking discovery is required to show "need." Defs.' Reply at 2-4, 5 citing *United States* v. *Poindexter*, 732 F. Supp. 142, 146 (D.D.C. 1990) [hereinafter "*Poindexter II*"]; *United States* v. *Poindexter*, 727 F. Supp. 1501, 1507-08, 1509 (D.D.C. 1989) [hereinafter "*Poindexter I*"]. In fact, the Court has simply found them inapposite, and easily distinguishable from the facts before it. It is true that, in the two *Poindexter* opinions cited by defendants, executive privilege had not first been asserted before a party seeking discovery was required to make any showing prior to obtaining discovery. However, the showing the party seeking discovery was required to make was not one of "need," but rather one of materiality and relevance pursuant to the applicable federal rules. *See Poindexter I*, 727 F. Supp. at 1509, *Poindexter II*, 732 F. Supp. at 147, both citing Fed. R. Crim. P. 17(c). The

party seeking discovery in that case was never required to do anything more than plaintiffs were required to do here with respect to submission of a proposed discovery plan: demonstrate that the documents and information sought are material and relevant to the legal questions before the Court. Additionally, the *Poindexter II* opinion expressly rejects a position similar to that taken by defendants here, stating

> Equally erroneous is the argument of counsel for former President Reagan and Department of Justice counsel acting on behalf of President George Bush . . . [who] assert that, in addition to showings of relevancy, materiality, and other incidents of admissibility, defendant is required to demonstrate that the testimony of the former President is central to his defense, and that a substitute from any other source would be inadequate . . . the precedents cited for this proposition do not support it. *The proposed standard would be extraordinary in a case where executive privilege has been invoked; it is particularly so in a non-privilege situation.* [emphasis added].

Id. at 146-47. Once again, the defendants have misrepresented precedent in order to fit it within their theory that a party must make some showing of "need" before an Executive Branch defendant should be even required to review documents responsive to a Court-approved discovery request, and to determine if viable grounds for assertion of a privilege exists.

The most recent *Poindexter* opinion sets forth the appropriate standard to be applied when deciding whether a criminal defendant's *subpoena* of both former and current Presidents to testify at trial should be

honored. *Poindexter II*, 732 F. Supp. at 146. The District Court held that

> While the former President has not claimed executive privilege, he will only be compelled to testify at the trial of this case if the Court is satisfied that his testimony would be material as tested by a meticulous standard, as well as being necessary in the sense of being a more logical and more persuasive source of evidence than alternatives that might be suggested. [emphasis added]

Id. at 147. The District Court reasoned that a contrary holding could infringe on the Executive Branch's deliberative processes if the President could subsequently be compelled to testify "with frequency and for non-essential or relatively trivial reasons." *Id.* at 147-48. Further, because the testimony subpoenaed might involve both privileged and non- privileged conversations, the District Court was mindful of the potential consequences of establishing a rule effectively requiring the President to assert executive privilege with respect to all conversations in order to avoid being called to testify, particularly in light of the Supreme Court's cautionary instruction that the executive privilege should not be "lightly invoked." *Id.* at 148 (citing cases).

The circumstances before the court in *Poindexter II* are easily distinguishable, on several grounds, from those extant in this case. A decision by the District Court in *Poindexter II* to enforce a subpoena requiring the President to testify at a trial would be analogous to a decision in this case requiring defendants to produce forthwith all of the documents requested by plaintiffs. No such Order has been entered in this case. In fact,

this Court has made it abundantly clear that it is not, at this stage, requiring production of any privileged documents. With respect to document production and responses to interrogatories, as opposed to subpoenas for live testimony, courts have approved, and this Court has adopted, procedures which allow the President and Executive Branch officials to first identify which documents are properly the subject of an invocation of executive privilege and which are not, and to produce the latter, but not the former. *See Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, Civ. A. No. 01-1530, 2002 WL 31519674 at *3 (D.D.C. Nov. 13, 2002) (citing cases).

Second, the implications of honoring a subpoena requiring the President to physically appear and testify before a Court are significant in terms of potential interference with the Presidential function, as noted by the *Poindexter II* opinion. Such a requirement is substantially different from an order requiring Executive Branch staff members to review documents responsive to a discovery request, identify those which are privileged, and produce non-privileged documents and a privilege log, a procedure approved by the Supreme Court. *See, e.g., Nixon* v. *Administrator of General Services*, 433 U.S. 425, 439-55 (1977). Moreover, this Court has already determined, both in its July 11, 2002 Order, and at a subsequent hearing with respect to plaintiffs' proposed discovery plan, that the discovery sought is material and necessary, and therefore meets the standard enunciated in *Poindexter II*, which defendants seek to apply in this case under dramatically different circumstances. *See* Tr. 08/02/02 Hr'g. at 19:1 - 19:3; *Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *31-32.

In the first *Poindexter* opinion, addressing subpoenas for a President's diaries and personal notes in a criminal prosecution, the District Court also did not, as defendants contend, require that the party seeking enforcement of the subpoena establish a "compelling need" for the documents before the subpoena could issue. *See Poindexter I*, 727 F. Supp. at 1507-08, 1509. Rather, proceeding expressly pursuant to the Federal Rules of Criminal Procedure, as it would with respect to any other request for a subpoena not involving the President, the court simply narrowed the scope of subpoenas "to eliminate demands that request documents defendant can obtain from other sources, that are unduly broad or oppressive, or that ask for documentary evidence that is clearly not material to the defense" before issuing them. *Id.* Where portions of the subpoenas were quashed, the *Poindexter I* court did so largely because the information requested was no longer in the President's possession, had already been provided to the defendant, or was available from other sources. *Id.* at 1508-10. Where the defendant was unable to provide sufficient specificity to establish materiality of documents requested because the documents themselves were not available to him, the *Poindexter I* court conducted an *in camera* examination of the former President's diaries, notes, and notebooks to determine whether they contained relevant evidence which should be produced.[3] *Id.* at 1510.

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[3] *In camera* inspection of documents to determine relevance and admissibility in a criminal prosecution *after* assertion of presidential privilege and presentation of sufficient evidence to rebut the presumption of privilege which attends such an assertion was approved by the U.S. Supreme Court in *United States* v. *Nixon*,

The equivalent of this process has already occurred in this case, as demonstrated by the Court's July 11, 2002 Order and its evaluation of plaintiff's proposed discovery plan. *See Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, Civ. A. No. 01-1530 (D.D.C. Aug. 8, 2002) (Order approving plaintiffs' proposed discovery plan and setting forth discovery procedures); Tr. 08/02/02 Hr'g. at 19:1 - 19:3; *Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *31-32. In other words, this Court has already done essentially what the *Poindexter* court did: it has determined what precise discovery is both material and necessary to resolve the threshold issues presented in this case and subsequently approved it.

Where, as here, "other than their interpretation" of cases, and citation to cases the court has found to be inapposite, defendants "have offered little to support their desired result and they have not persuaded the Court that conflicting authority exists on the issue presented" as applied to the relevant facts, interlocutory appeal pursuant to § 1292(b) has been held to be unwarranted. *See First Am. Corp* v. *Al-Nahyan*, 948 F. Supp. at 1117. Furthermore, "neither unusual facts nor legal issues of first impression require, or in this

418 U.S. at 713-14. This Circuit has approved *in camera* inspection of documents to determine the propriety of a President's assertions of executive privilege *after* they were made, as well as the relevance of the materials to grand jury proceedings. *Nixon* v. *Sirica*, 487 F.2d 700, 718-721 (D.C. Cir. 1973). This Court has repeatedly offered defendants the option of offering responsive documents to the Court for *in camera* review, *prior* to assertion of any privilege with respect to the documents, thereby offering defendants exactly the same procedure followed by the *Poindexter II* court. Defendants have not accepted this proposal by the Court.

instance justify, certification of an interlocutory appeal." *Id.*

Moreover, in their motion for certification, defendants persist in conflating within the term "discovery" the notion of requiring production of documents and the far less drastic result of this Court's Orders, which simply require that defendants produce non-privileged documents and make particularized assertions of privilege where appropriate. *See Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, Civ. A. No. 01-1530, 2002 WL 31519674 at *3 (D.D.C. Nov. 13, 2002); *Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, Civ. A. No. 01-1530 (D.D.C. Oct. 17, 2002) (Order denying motion for protective order); *Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, Civ. A. No. 01-1530 (D.D.C. Aug. 8, 2002) (Order approving plaintiffs' proposed discovery plan and setting forth discovery procedures). Compliance with the Court's Orders will not necessarily result in plaintiffs "obtaining" *any* discovery, as it is entirely conceivable that defendants could assert specific viable claims of privilege for every responsive document or category of documents. Only then would the question defendants seek to certify for interlocutory appeal, whether discovery should be provided to plaintiffs without demonstrating "any need" for the documents requested, be ripe for judicial review.

This Court has already answered that question in the affirmative, in a manner consistent with existing authority, which establishes that the appropriate stage at which to require a party seeking discovery to demonstrate "need" arises only after the opposing party has asserted a privilege, even where that party is a member of the Executive Branch, up to and including the

President of the United States. *Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *26, 27, *see also Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 31519674 at *3 (citing cases). Therefore, by mischaracterizing the intent and effect of this Court's Orders, defendants have created a legal question, for which they now seek certification, where none exists. Where "it is only against a mischaracterization of the Court's holdings that the plaintiff can identify substantial ground for a difference of opinion," a motion to certify under § 1292(b) is properly denied. *See Foster* v. *United States*, 926 F. Supp. 199, 203 (D.D.C. 1996).

Finally, this Court's discovery Orders would not require reversal if decided incorrectly, nor would such a finding materially alter the course of litigation. *See Johnson* v. *Burken*, 930 F.2d at 1206. The Eighth Circuit has held that "resolution of a discovery dispute does little to advance the ultimate termination of litigation and results only in delay." *White* v. *Nix*, 43 F.3d at 378-79 (reasoning that plaintiff would press his claim regardless of whether or not he obtained the files the court had ordered produced, potentially seeking to discover the same information through alternate means; "[w]hen litigation will be conducted in substantially the same manner regardless of our decision, the appeal cannot be said to materially advance the ultimate termination of the litigation."). None of the circumstances present in cases where interlocutory appeal has been justified on this ground exist here. *See, e.g.*, *Johnson* v. *Wash. Metro Area Trans. Auth.*, 773 F. Supp. at 461 (resolution of an "apparent intra-circuit split" might negate the need for a jury trial). Conversely, untimely interlocutory appeal of orders can

"prolong and substantially delay the litigation," causing all parties to incur greater expense, and thus do not "materially advance the litigation." *See In re Vitamins Antitrust Litigation*, 2000 WL 673936 at *3; *Brown* v. *Pro Football, Inc.*, 812 F. Supp. 237, 239 (D.D.C. 1992).

Defendants' contention that certification of this Court's Orders for interlocutory appeal will materially advance this litigation necessarily assumes that they will prevail on appeal. This result is far from certain. As noted by one District Judge, "[w]hile certainly the ultimate termination of this litigation would be advanced if the Court of Appeals heard and sustained defendant's defense at this time, the court is not of the opinion that this is a likely course of events. Therefore, the court will not invoke its discretionary authority to certify the issues decided in [its] Order to the Court of Appeals under section 1292(b)." *U.S. ex rel Hollander*, 420 F. Supp. at 859; *see Nix*, 43 F.3d at 378- 79.

Defendants also assume that a ruling in their favor on all three issues at the Circuit level will result in dismissal of the action as to them, or at least relieve them of the burden of participating in discovery. However, a number of substantive questions were left unresolved by this Court's July 11, 2002 Order which would require further litigation before this Court, with or without the benefit of discovery of non-agency defendants. *See* Tr. 11/13/02 Hr'g. at 33:23-24. In fact, a ruling favorable to the defendants on this issue could conceivably result in more arduous proceedings for all parties, as the Court and the parties struggle to find other ways of establishing whether or not the predicate facts for the application of FACA exist, and moving this litigation forward. Accordingly, defendants have not carried their burden of demonstrating that interlocutory appeal of

this question at this point in time would materially advance the litigation as a whole.

D. Availability of discovery in action pursuant to the APA or mandamus statutes

The third question defendants seek to certify for interlocutory appeal concerns the availability of discovery under the APA or the federal *mandamus* statute. Defendants contend that it is "well settled" that judicial review pursuant to the APA must be limited to the administrative record absent "exceptional circumstances," which only arise upon a "strong showing of bad faith or improper behavior" or "when the record is so bare that it prevents effective judicial review." Defs.' Mot. at 6, 8; Defs.' Reply at 6, citing *Commercial Drapery Contractors, Inc.* v. *United States*, 133 F.3d 1, 7 (D.C. Cir. 1998). They further hypothesize, citing only to their own arguments in objection to the plaintiffs' proposed discovery plan, that the scope of discovery in a *mandamus* action should be no greater than that permitted under the APA. *See* Defs.' Mot. at 6, Defs.' Reply at 6.

The question of the scope of permissible discovery in a *mandamus* or APA action is not controlling, and its resolution will not materially advance this litigation. As plaintiff Sierra Club correctly points out, if this Court has reached an incorrect conclusion under either the *mandamus* statute or the APA with respect to the propriety of limited discovery this case, then the Court of Appeals is free, upon review of final judgment, to make its ruling on the APA record alone, or to remand to this Court for such a review of plaintiffs' claims. Additionally, as defendants have repeatedly stated, agency defendants, who are the only defendants against whom discovery was sought under the APA, have already provided plaintiffs with discovery, thereby rendering the question moot for purposes of interlocutory appeal. *See* Tr. 11/13/02 Hr'g. at 32:24 - 33:2.

Moreover, with respect to the proper scope of discovery in a *mandamus* action, defendants' citation to their own arguments, without more, is simply insufficient to create the requisite "substantial ground for difference of opinion" on this issue. A litigant cannot create a "substantial ground for difference of opinion" justifying interlocutory appeal simply by arguing for a particular interpretation or extension of existing law. Furthermore, as defendants themselves concede, what authority they do rely on with respect to this question actually suggests that, under certain circumstances, discovery is appropriate in a *mandamus* action. *See* Defs.' Objections to Plaintiffs' Proposed Discovery Plan at 9 n.6, citing *Conservation Law Foundation of New England, Inc.* v. *Clark*, 590 F. Supp. 1467, 1472-73 (D. Mass. 1984) ("Courts have indicated that independent fact finding under mandamus is appropriate in some circumstances even where agency action is under review."). Although discovery in a *mandamus* action may not be appropriate where the statute governing agency action provides significant discretion, or where relevant regulatory issues are particularly within the agency's competence and expertise, courts have found discovery to be appropriate where an agency has either completely abrogated its enforcement responsibilities or acted clearly outside the bounds of relevant statutes. *Id.* at 1473 (citing cases). None of these factors counseling either for or against discovery in a *mandamus* action are necessarily present in the current case. However, both the contemplated review of agency action and the "record" in this case are decidedly uncon-

ventional. This Court has identified compelling reasons in favor of allowing tightly reined discovery on threshold issues, which, in light of the absence of authority holding such discovery unavailable, it deems sufficient to justify the discovery contemplated by the Orders here challenged. *See Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *31, 32.

As for the proper scope of discovery in an APA action, this Court has impliedly held that this case does in fact present the type of "exceptional circumstances" in which discovery beyond the administrative record is required to assist the Court in adjudicating the questions before it. *See Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *23 (stating that defendants' argument that no further factual development is required "flies in the face of the precedent that has developed separation of powers doctrine as a fact-intensive, case-by-case analysis of the specific nature of the intrusion into the President's performance of his constitutional duties."); Tr. 08/02/02 Hr'g. at 19:1 - 19:11. This Court has already concluded that, in light of the delicate balancing of constitutional concerns required of the Court in this case, more information than is contained in the scant administrative record currently available, which consists in its entirety of the President's memorandum to the Vice-President establishing the NEPDG, the NEPDG's final report, and the affidavit of the NEPDG's former Deputy Director, is necessary to resolve the question of whether and how FACA is applicable to the NEPDG. *See Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *31-32.

This conclusion is not inconsistent with the precedent cited by defendants in support of their contention that,

as a general rule, no discovery beyond the administrative record should be permitted in an APA case. *See* Defs.' Mot. at 8, Defs.' Reply at 6. The facts of the case currently before this Court most certainly do not present circumstances analogous to those present in the APA cases cited by defendants, in which an agency's adjudicative or legislative processes were the subject of judicial review. *See, e.g., Camp* v. *Pitts*, 411 U.S. 138, 141-142, 93 S. Ct. 1241, 1243-44 (1973) (adjudicative process); *Marshall Co. Health Care* v. *Shalala*, 988 F.2d 1221, 1226-27 (D.C. Cir. 1993) (rulemaking); *see also Conservation Law Foundation of New England, Inc.*, 590 F. Supp. at 1474-75 (recognizing, in the context of rulemaking, a number of exceptions to the general rule that a court's inquiry in administrative review cases is "confined to the full record before the agency at the time the decision is made"); *see also* Tr. 08/02/02 Hr'g. at 13:16 - 14:25. Additionally, this Court has already concluded that the administrative record here is "so bare that it prevents effective judicial review." *See* Tr. 08/02/02 Hr'g. at 19:1 - 19:3; *Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at 31 ("it would be inappropriate for this Court to conduct the fact-intensive inquiry demanded by separation of powers precedent by considering only the Presidential Memorandum that established the NEPDG."); *see also Commercial Drapery Contractors, Inc.* v. *United States*, 133 F.3d 1, 7 (D.C. Cir. 1998); *Conservation Law Foundation of New England, Inc.*, 590 F. Supp. at 1474-75 (most exceptions to the rule confining APA review to the record before the agency "involve instances where the record submitted by the agency is self-serving, incomplete or unclear."). Therefore, this Court has found, consistent with controlling and persuasive precedent, that circumstances exist in this case

warranting limited discovery into matters outside the scant administrative record.

In light of the foregoing, it is clear that defendants have failed to carry their burden of establishing the existence of a "controlling question of law" as to which there is a "substantial ground for difference of opinion" with respect to the permissible scope of discovery under the federal *mandamus* statute or the APA. At most, they have argued for a different application of the law to the facts before the Court, and specifically for application of the general rule rather than the permissible exception. Defendants can advance such arguments on appeal after final judgment, but they have not established the basis for doing so at this time under § 1292(b).

With respect to all three questions for which they seek certification, defendants have not met their burden of establishing that exceptional circumstances justifying interlocutory appeal exist under the standard set forth by § 1292(b). Defendants have, throughout this litigation, zealously advocated in favor of, at best, a different interpretation, and at most, a dramatic extension of existing precedent with respect to each of the three legal questions they seek to certify. However, defendants' conviction of the correctness of their position is insufficient to carry them over the high threshold posed by the standard governing certification for interlocutory appeal. Defendants have simply failed to establish the factual and legal predicates justifying interlocutory review pursuant to § 1292(b).

Accordingly, it is by the Court hereby

ORDERED that defendants' motion for certification of interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is hereby **DENIED.**

Signed: EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE
November 26, 2002

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No. 02-5354
(Consolidated with Nos. 02-5355, 02-5356)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: RICHARD B. CHENEY,
VICE PRESIDENT OF THE UNITED STATES,
ET AL. PETITIONERS

On Appeal And Petition For A Writ Of Mandamus
From The United States District Court For
The District Of Columbia

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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CONCISE STATEMENT OF THE ISSUES AND THEIR IMPORTANCE

This case presents separation-of-powers questions of exceptional importance arising from the district court's orders compelling the Vice President and other close presidential advisors to comply with broad discovery requests by private parties seeking information about the process by which the President received advice on important national policy matters from his closest advisors. The panel majority's opinion, which holds that the district court's unprecedented discovery orders are insulated from interlocutory review, exacerbates the "serious constitutional problem[s]" inherent in the Federal Advisory Committee Act (FACA), 5 U.S.C. App. §§ 1 *et seq.*, especially as construed by this Court in *Association of American Physicians & Surgeons, Inc.* v. *Clinton*, 997 F.2d 898 (D.C. Cir. 1993) (*AAPS*). Slip op. 1 (Randolph, J., dissenting). As Judge Randolph explained in his dissent: "As applied to committees the President establishes to give him advice, FACA has for many years teetered on the edge of constitutionality. The decision in this case pushes it over." *Ibid.* (citing Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 Yale L.J. 51 (1994)).

In particular, the majority's holding that this Court lacks jurisdiction because the President has yet to assert executive privilege over any of the information sought in discovery misunderstands both this Court's cases governing mandamus and appellate jurisdiction and the nature of petitioners' separation-of-powers arguments, which do not turn on claims of privilege, but rather on the inappropriateness of ordering any discovery against the President's closest advisors based

on unsupported assertions in a complaint that they disobeyed a clear directive by the President in the formation of an advisory committee. Moreover, by permitting broad-ranging discovery based on such bare allegations of wrongdoing, the decisions of the district court and the panel conflict with precedents of this Court and the Supreme Court limiting discovery in Administrative Procedure Act (APA) and mandamus actions and affording a presumption of regularity to executive action. While both the Supreme Court and this Court have interpreted the FACA to avoid constitutional problems, the decisions by the panel and the district court will routinely generate the kind of intrusions the courts have sought to avoid. En banc review by this Court is warranted to resolve those conflicts and to ensure that the FACA does not intrude on the President's vital interests in receiving unregulated and uninhibited advice from his closest advisors or on the unique relationship between the Presidency and the Vice Presidency.

STATEMENT OF FACTS

1. President Bush established the National Energy Policy Development Group (NEPDG) as an entity within the Executive Office of the President in a memorandum dated January 29, 2001. *See* App. 117. The President named the Vice President to preside over meetings and direct the work of the NEPDG and designated a number of other senior federal officials to constitute the NEPDG. App. 117-18. The NEPDG's mission was to "develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State, and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy." App. 118.

It was directed to "gather information, deliberate, and, as specified in this memorandum, make recommendations to the President." *Ibid.* On May 16, 2001, the NEPDG issued a public report containing a set of recommendations to enhance energy supplies and encourage conservation. *See NEPDG Report* (available at *www.whitehouse.gov/energy/National-Energy-Policy.pdf*). The report included a list of the members of the NEPDG. In accordance with the President's January 2001 memorandum, App. 117, all of the members identified in the report were "officers of the Federal Government." The NEPDG was terminated on September 30, 2001. App. 119, 257-58.

2. Plaintiffs Judicial Watch, Inc. and Sierra Club filed these consolidated actions against Vice President Cheney, the NEPDG, and various federal officials and private individuals, alleging that the NEPDG was a FACA advisory committee. Plaintiffs requested access to NEPDG documents and a declaration that the defendants violated the FACA. App. 48, 113-15. The government filed motions to dismiss, which the district court granted in part and denied in part. The court held that the FACA itself provides no private right of action, but that the statute is enforceable through either the APA or mandamus. The court recognized that the Vice President is not an "agency" within the meaning of the APA, App. 148-49, but, without deciding the question, left open the prospect that the Vice President could be sued through mandamus, App. 169. It also deferred ruling on the government's contention that applying the FACA to the NEPDG would violate the separation of powers and interfere with core Article II prerogatives, on the ground that discovery could obviate the need to resolve that constitutional question. App. 170-94. The

court acknowledged "the seriousness of the constitutional challenge raised by defendants," App. 171, and it recognized that allowing discovery could present related constitutional questions, App. 193.

The court nevertheless directed plaintiffs to submit a proposed discovery plan, which it approved on August 2, 2002, directing the government to "fully comply with" plaintiffs' discovery requests or "file detailed and precise objections to particular requests." App. 238-39. Among other things, the district court approved the plaintiff's request for the production of documents and information concerning communications between individual NEPDG members outside the context of group meetings, between members and agency personnel, and between members and outside individuals. *See, e.g.*, App. 246, 251, 253.

The government sought a protective order with respect to discovery against the Office of the Vice President and urged the district court to consider a motion for summary judgment and rule on the basis of the administrative record in accordance with established APA procedure. In addition, the government submitted an affidavit of Karen Knutson, the Deputy Assistant to the Vice President for Domestic Policy, who detailed attendance at all meetings of the NEPDG and of a so-called "Staff Working Group." App. 257, 260-62. Ms. Knutson confirmed that all members of the NEPDG, and persons who attended its meetings, were government officers or employees, as were the staff assembled to assist the NEPDG and draft the report. *See* App. 261-62. The district court denied the government's motion for a protective order, App. 313, and declined to allow the government to file a motion for summary judgment, App. 264.

ARGUMENT

I. THIS COURT HAS BOTH MANDAMUS AND APPELLATE JURISDICTION

The panel majority held that it lacked jurisdiction to issue a writ of mandamus because the district court's refusal to proceed on the basis of the administrative record and to dismiss the Vice President "can be fully addressed, untethered by anything we have said here, on appeal following final judgment." Slip op. 16. The majority based this conclusion on the fact that the petitioners have not yet asserted document-specific privileges and on its assumption that more targeted discovery than the district court had required might establish that the NEPDG is not a FACA committee, thereby obviating the need to address petitioners' constitutional arguments. *Id.* at 8-19. For similar reasons, the majority dismissed the Vice President's appeal for lack of jurisdiction. *Id.* at 20.

This Court, however, has both mandamus and appellate jurisdiction to review the district court's unprecedented and unconstitutional discovery orders. By holding that petitioners have no means of challenging those discovery orders on interlocutory review and that they must endure an ongoing separation-of-powers injury, the panel majority has significantly exacerbated the constitutional problems inherent in the FACA and *AAPS*. Under the district court's and the majority's opinions, there is nothing the President or his advisors can do to avoid broad discovery by private parties based on the barest of allegations anytime the President seeks advice from a formal group of his closest advisors. Given the important separation-of-powers problems presented by the discovery permitted by the

majority, its jurisdictional errors warrant en banc review.

1. Contrary to the majority's holding (slip op. 11, 13), the fact that petitioners have not yet asserted privilege over the documents subject to the district court's discovery orders does not render the separation-of-powers problems associated with those orders either "premature" or "hypothetical." Nor can those problems be adequately addressed by the district court on remand or by appeal after final judgment. The separation-of-powers arguments raised in the petition for mandamus are not premised upon claims of privilege over particular documents or categories of documents. Rather, petitioners claim that the Vice President and other close Presidential advisors may not be forced through civil discovery to review the process by which they advised the President and assert executive privilege over certain communications in response to mere unsupported allegations that the membership of the President's advisory committee was materially different from that directed by the President and stated in the committee's report. The district court's open-ended discovery orders, even as limited by the panel majority, are aimed at exposing details of the process by which a President obtains information and advice from the Vice President and other close advisors and raise separation-of-powers concerns of the first order, whether or not the information is privileged.

The majority (slip op. 12) mistakenly reads *In re Executive Office of the President*, 215 F.3d 20 (D.C. Cir. 2000), to establish that mandamus review of discovery orders is always unavailable "absent a viable claim that some important privilege will be infringed if discovery is allowed to proceed." The Court in that case, however, merely held that, if executive branch officials seek mandamus on the ground that a discovery order will result in the disclosure of privileged information, they must show that the information is privileged. The Court rejected mandamus because the officials "present[ed] no substantive argument whatsoever" in support of their privilege claims. *Id.* at 24. The Court neither held that a claim of privilege was a necessary prerequisite to mandamus review, nor purported to set out a general rule. Indeed, it emphasized that "[t]here are occasions when mandamus relief may be appropriate to challenge a District Court's discovery order," *id.* at 23, and it gave as an example *In re Papandreou*, 139 F.3d 247 (D.C. Cir. 1998), which granted mandamus to review an assertion of diplomatic immunity from any discovery whatsoever.

The panel majority, however, sidestepped both *In re Papandreou* and *In re Sealed Case*, 151 F.3d 1059 (D.C. Cir. 1998). In the latter, the Court granted the Independent Counsel's mandamus petition where the district court's disclosure orders were insufficiently protective of grand jury information. Most notably for purposes of this case, the Court rejected the assertion that the Independent Counsel "would not be irreparably harmed by the orders because the orders allowed him to redact any Rule 6(e) material and thus he would not be required to provide any confidential investigative material to the movants." *Id.* at 1062. The Court held "that the disobedience and contempt route to appeal cannot be labeled an adequate means of relief for a party-litigant." *Id.* at 1065. The Court further explained that the Independent Counsel "is not troubled solely by the possibility that Rule 6(e) material might be disclosed, but also by the prospect of disclosing even

the identities of members of the press with whom the IC and his staff have spoken." *Id.* at 1066. Likewise, a limitation on disclosure alone would not "assuage petitioner's fear that discovery and an adversarial hearing will divert petitioner's focus." *Ibid.*

Both *In re Papandreou* and *In re Sealed Case* support mandamus jurisdiction here, and the panel's decision holding mandamus categorically unavailable conflicts with those decisions in a manner that justifies en banc review. First, just as in *In re Papandreou*, petitioners' separation-of-powers objections to the district court's discovery orders are separate and antecedent to any claims of privilege. Accordingly, the potential availability of those privilege claims does not limit this Court's jurisdiction. The majority itself recognized that petitioner's separation-of-powers arguments are both broader than and antecedent to any specific future claims of privilege, *see* slip op. 13 (characterizing petitioner's separation-of-powers argument as more like an "immunity" than a privilege), but then failed to recognize the jurisdictional consequence of that observation. As the Court in *In re Papandreou* explained: An "immunity claim has special characteristics beyond those of ordinary privilege. The typical discovery privilege protects only against disclosure; where a litigant refuses to obey a discovery order, appeals a contempt order, and wins, the privilege survives unscathed. For an immunity, this is not good enough." 139 F.3d at 251. So too here. The kind of discovery ordered violates the separation of powers without regard to whether privilege could or would be asserted. That is made clear in the Supreme Court's decision in *Public Citizen* v. *United States Dept. of Justice*, 491 U.S. 440 (1989), in this Court's decision in

AAPS, and in Judge Gesell's decision in *Nader* v. *Baroody*, 396 F. Supp. 1231 (D.D.C. 1975). In each case, the court acknowledged the serious separation-of-powers concerns raised by the FACA, even though no privilege claim had been asserted. *See, e.g., Nader*, 396 F. Supp. at 1234 & n.5 (concern that President had not asserted privilege "misses the point").

Likewise, as in *In re Sealed Case*, 151 F.3d at 1066, the separation-of-powers problems go well beyond the confidentiality concerns addressed by privilege, and discovery has the potential to "divert [the] * * * focus" of the President and his closest advisors. By requiring the President to make "document by document" and "line by line" assertions of privilege over the myriad of documents covered by the discovery orders, the majority's approach ensures that "the President will be distracted and diverted from the performance of his constitutional duties and responsibilities." Slip. op. 8 (Randolph, J., dissenting).

Accordingly, the potential assertion of privilege does not eliminate the separation-of-powers problems of ordering discovery to probe the process by which the Vice President and other close advisors gathered information to advise the President. Petitioners cannot obtain meaningful review of their claims after discovery has concluded, because the very essence of their claims is that any discovery in the context of the record in this case would violate the separation of powers.

2. For similar reasons, the majority's denial of jurisdiction over the Vice President's appeal and its attempt to distinguish *United States* v. *Nixon*, 418 U.S. 683 (1974), are also mistaken. The majority's reading of *Nixon* as requiring the assertion of a privilege claim before an appeal may be permitted (slip op. 15-16) is

illogical. Where, as here, the separation-of-powers arguments do not take the form of—and are logically antecedent to—a privilege claim, it serves no purpose to require the President or Vice President to assert privilege claims before permitting an interlocutory appeal.

In any event, *Nixon* did not turn on the assertion of privilege, but on separation-of-powers concerns raised by forcing the President to submit to contempt proceedings merely to facilitate timely review. The Court held that "the traditional contempt avenue to immediate appeal is peculiarly inappropriate" in a case involving the President. 418 U.S. at 691. "To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government." *Id.* at 691-92. Moreover, the Court held, "a federal judge should not be placed in the posture of issuing a citation to a President simply in order to invoke review." *Id.* at 692. Those same considerations support permitting an appeal here by the Vice President (or, at a minimum, providing appellate review on the merits of constitutional objections raised by the Vice President). *Cf. In re Papandreou*, 139 F.3d at 250 (citing *Nixon* and stating that "[m]andamus has been recognized as an appropriate shortcut when holding a litigant in contempt would be problematic").

The majority did not question that the unique role of the Vice President under the Constitution places him within the *Nixon* exception to the contempt requirement. Nevertheless, under the majority's approach,

the only way that the Vice President can obtain appellate review of his constitutional objections to improper discovery would be to refuse to comply with *any* discovery on remand and appeal an order holding him in contempt.

II. SEPARATION-OF-POWERS PRINCIPLES PRECLUDE DISCOVERY INTO THE ADVISORY ACTIVITIES OF THE VICE PRESIDENT AND OTHER PRESIDENTIAL ADVISORS BASED ON UNSUPPORTED ALLEGATIONS THAT NON-GOVERNMENTAL MEMBERS PARTICIPATED IN THOSE ACTIVITIES

By permitting broad discovery based solely on unsupported allegations of misconduct by federal officials in organizing an advisory group, and by rejecting any avenue for interlocutory review of such intrusive and improper discovery, the panel majority has generated the very type of unconstitutional intrusion into Executive Branch decisionmaking that cases such as *Public Citizen* and *AAPS* have sought to avoid in construing the FACA. As interpreted by the district court and the panel majority, there is little doubt that the FACA would violate the separation of powers, at least as applied to the Vice President and other close presidential advisors.

A. As Construed By The District Court And The Panel Majority, The "De Facto" Member Doctrine Adopted In *AAPS* Renders The FACA Unconstitutional

Both the district court (*see* App. 190-194) and the panel majority (*see* slip op. 10-11, 16-18) relied heavily on the part of *AAPS* that remanded a FACA case for expedited discovery. *See* 997 F.2d at 901, 915-16. The

AAPS Court stated that, in the context of that case, it would look beyond formal membership to determine whether persons formally designated as "consultants" to task force working groups "may still be properly described as * * * member[s] of an advisory committee if [their] involvement and role are functionally indistinguishable from those of the other members." *Id.* at 915.

AAPS, however, does not support discovery *in this case*, and the majority's opinion, although purporting to be bound by *AAPS*, represents a significant—and constitutionally problematic—extension of *AAPS*'s de facto member doctrine that puts the FACA on a collision course with the Constitution. First, *AAPS* did not consider the source of a cause of action to enforce the FACA, which this Court only later indicated is the APA, *Claybrook* v. *Slater*, 111 F.3d 904, 908-09 (D.C. Cir. 1997). Accordingly, the *AAPS* Court had no occasion to consider the scope of discovery properly available in an APA (or mandamus) action alleging a FACA violation. The parties did not ask the Court to confront the issue. Nothing in *AAPS* therefore should be read as authorizing broad discovery in an APA or mandamus action based on a mere allegation of de facto members.[1]

Second, *AAPS*'s discussion of "de facto" members should not be transplanted beyond the unique facts of that case. Most notably, in *AAPS*, the government's

[1] Indeed, the Court in *AAPS* arguably rejected such an approach by noting that "the government has a good deal of control over whether a group constitutes a FACA advisory committee," and, "for that reason, it is a rare case when a court holds that a particular group is a FACA advisory committee over the objection of the executive branch." 997 F.2d at 914.

own submissions raised genuine questions as to whether the working group at issue was, in fact, composed of government officers and employees, *see* 997 F.2d at 914-15, and whether the group lacked the formality and structure of an advisory committee, *id.* at 914. No comparable questions have been raised here. To the contrary, the President's order establishing the NEPDG unambiguously requires that only government officials be permitted to act as members, and the NEPDG's published report confirms that the President's command was followed.[2]

Despite these differences, the panel majority viewed itself as bound by *AAPS*. But by extending *AAPS* to the very different procedural and factual context at issue here, the panel's reading of *AAPS*, "pushes it over" the constitutional edge. Slip op. 1 (Randolph, J., dissenting). As Judge Randolph explained, the de facto membership doctrine has no support in the FACA's text, conflicts with the relevant GSA regulation, 41 C.F.R. § 101-6.1003 (2000), and as construed by the district court and the panel majority, inevitably leads to constitutionally problematic discovery.

[2] Two other features of *AAPS* are noteworthy. The Court in *AAPS* did not provide for proceedings on remand on any question concerning the President or Vice President or the membership of the task force itself, once the *legal* status of the First Lady's conceded role was resolved; rather, only subsidiary matters concerning staff-level participation by outsiders in actual deliberations was involved. And, although the Court's decision referred to expedited discovery, it would have been open to the government to argue on remand that, at least in the first instance, the factual questions should have been resolved by further government submissions.

In the context of this case in particular, the majority's construction of the doctrine threatens to cripple the President's ability to employ groups of high-level government officials as a means of obtaining advice. The district court subjected petitioners to discovery at least as broad and constitutionally problematic as the disclosure requirements of the FACA itself in order to determine whether there were unauthorized de facto members of the NEPDG. It did so, moreover, based solely on an unsupported allegation in a complaint that is contradicted by the President's order creating the NEPDG, by the NEPDG's published report, and by a declaration by a top NEPDG staff person, all of which confirm that there were no non-governmental NEPDG members—de facto or otherwise. Any construction of *AAPS* or the FACA that would permit discovery in such circumstances would violate fundamental principles of the separation of powers. Indeed, in important respects, the constitutional intrusion here is even more significant than that at issue in *Public Citizen* or *AAPS*. Those cases threatened to restrict the President's means of obtaining advice from private persons. The majority's position would restrict not only legitimate contacts with private persons, but would cause the President to hesitate before creating any formal working group consisting wholly of heads of executive departments. Accordingly, if the majority's characterization of *AAPS* is accepted, then petitioners request that the en banc Court either limit *AAPS* to its specific context or revisit the issue and reject the de facto member doctrine.[3]

[3] The majority mistakenly states that petitioners did not argue below or before the panel that *AAPS* should be overturned or that the district court's construction of the FACA is unconstitutional. Slip op. 17. *But see id.* at 9 n.5 (Randolph, J., dissenting) ("[T]he federal officers have repeatedly argued before the district court and this court that the discovery, as permitted by *AAPS*, violates the separation of powers. *See, e.g.*, Emergency Pet. for Writ of Mandamus at 14-15; *Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 46 (D.D.C. 2002). The problem here is not that the petitioners failed to make the arguments. The problem is that the majority failed to answer them."). In fact, petitioners argued below that *Public Citizen*, rather than *AAPS*, is the appropriate constitutional standard, and that *AAPS* was wrongly decided. *See, e.g.*, 3/8/02 Mem. in Support of Mot. to Dismiss at 18-23. In any event, it is to the en banc Court, not the district court or the panel, that a frontal challenge to *AAPS* should be directed. That is particularly true here, given that the panel heard argument based only on the mandamus petition itself, and petitioners have yet to be afforded an opportunity to brief this case fully before this Court. For that reason, should the Court grant rehearing, petitioners respectfully suggest that the court would benefit from a full round of briefing before the en banc Court.

B. Discovery Would Violate Longstanding Principles That Generally Preclude Discovery Into The Internal Workings Of The Executive Branch And That Afford Executive Branch Actions A Presumption Of Regularity

1. The Vice President has respectfully but resolutely maintained that, in the circumstances of this case, the legislative and judicial powers cannot extend to compelling a Vice President to disclose to private persons the details of the process by which a President obtains information and advice from the Vice President, heads of departments and agencies, and assistants to the President in the President's exercise of powers committed exclusively to the President by the Recommendations and Opinions Clauses. In particular, the Vice

President has argued that any application of FACA to hinder the Vice President's assistance of the President in discharging his core Article II responsibilities would violate the separation of powers. The district court recognized the seriousness of those concerns and then ordered sweeping discovery raising equally serious separation-of-powers problems. Those difficulties could have been avoided, however, if the district court had appreciated the significance of its determination that FACA does not provide a cause of action and so this lawsuit could proceed, if at all, only as an APA or mandamus action.[4] The APA makes clear that judicial review is generally based on an administrative record, not discovery. *See, e.g., Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 419 (1971). Thus, even in cases presenting significant allegations of agency misconduct, this Court has remanded the matter to the agency rather than allow discovery. *See Professional Air Traffic Controllers Org. (PATCO)* v. *FLRA*, 672 F.2d 109, 113 (D.C. Cir. 1982).

The panel majority, however, stated that discovery might be proper in this case under an exception to the

[4] Judge Randolph concludes (slip op. 1 n.1) that the APA "does not apply" because "[t]he alleged FACA 'advisory committee' here was not an 'agency' within the meaning of the APA Petitioners agree and so argued below. *See* 3/8/02 Mem. in Support of Mot. to Dismiss at 13. Accordingly, plaintiffs could sue, if at all, only under mandamus. Slip op. 1 n.1 (Randolph, J., dissenting). Petitioners have argued in the alternative that even if this case can proceed under the APA, as the district court held, discovery here was improper because the administrative "record" makes clear that the FACA does not apply. In any event, the discovery available under mandamus can be no more intrusive than that authorized under the APA.

APA's rule against discovery for cases in which the record is so bare that it prevents effective judicial review. Slip op. 10. The majority suggested that the record of the NEPDG's activities was not a traditional administrative record and that while the President's memorandum establishing the NEPDG and the NEPDG's report "tell us * * * that the NEPDG's members were all federal employees," they "reveal nothing about whether, notwithstanding the President's appointment of only federal officials, non-federal personnel participated in the work of the NEPDG 'as if they were members.'" *Ibid.* (quoting Judicial Watch Am. Compl. ¶ 25).

But as Judge Randolph's dissent points out (slip op. 6-7), the issue is not whether the record of the NEPDG —which after all, was not an "agency" within the meaning of the APA—complied with the precise record-keeping requirements of the APA. Rather, the only question is whether Congress, in enacting the FACA, intended to permit discovery based on unsupported statements of the kind on which plaintiffs rely. There is no indication in the FACA, which does not expressly provide for judicial enforcement, that Congress wished to sanction this type of intrusion. The FACA does not create any requirements for creating a record documenting membership and by its terms imposes no requirements on committees made up exclusively of government employees. By omitting any express right of private enforcement and imposing no record-keeping requirement for membership questions, Congress at most intended that the statute be enforced only as consistent with the APA and its assumption that records concerning membership will often be relatively bare.

Under the APA, as *Overton Park* explains, courts generally may not order discovery. 401 U.S. at 419. To be sure, *Overton Park* allows discovery to fill in a "gap" in the administrative record. But a gap exists only where the record taken as a whole would not permit review of the agency action under Section 706, and here, there is no "gap." Both the President's memorandum establishing the NEPDG and the NEPDG's report speak clearly to the issue of the group's membership, and both confirm that its only members were federal officials. The alleged "gap" stems only from plaintiffs' unsupported allegation that somewhere there is a document that shows that the President was disobeyed and private individuals were somehow permitted to serve as NEPDG members. Such baseless allegations, however, could always be made to suggest a "gap" in any administrative record. Nothing in *Overton Park* suggests discovery would be appropriate based on such allegations.[5]

2. In addition, both the district court's discovery orders and the majority's opinion suggest that the plaintiffs' claims could not be adjudicated on the basis of the administrative record or supplemental declarations filed by the government because of what those courts chose to accept as an ever-present *possibility* of irregularities (unsupported by any specific evidence in this case). That approach reverses the normal presumption

[5] Nor is there any reason to believe that Congress wished to allow a plaintiff to circumvent APA limitations by seeking a writ of mandamus against the Vice President. Indeed, even where mandamus review is available, it is also generally limited to an administrative record, *see Texas Rural Legal Aid, Inc.* v. *Legal Serv. Corp.*, 940 F.2d 685, 698 (D.C. Cir. 1991).

of regularity accorded to government action. *See United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001); *American Fed. of Gov't Employees, AFL-CIO* v. *Reagan*, 870 F.2d 723, 727-28 (D.C. Cir. 1989). It is that presumption, not a generalized speculation that "the government doesn't always comply with the law," App. 217, that governs extra-record discovery into even routine agency action. As the Supreme Court and this Court have explained, "*in the absence of clear evidence to the contrary*, courts presume that [public officers] have properly discharged their official duties." *United States* v. *Chemical Found.*, 272 U.S. 1, 14-15 (1926) (emphasis added); *Morris* v. *Sullivan*, 897 F.2d 553, 560 (D.C. Cir. 1990) (same). And that presumption, in turn, ordinarily precludes discovery into the inner workings of the Executive Branch. *See United States* v. *Armstrong*, 517 U.S. 456, 463-65, 468-70 (1996).

Absent a compelling showing of need by a party seeking discovery from the Vice President and the President's other immediate advisors, a court should not even consider whether such discovery may constitutionally be ordered in a particular case. *See United States* v. *Poindexter*, 727 F. Supp. 1501, 1504-06 (D.D.C. 1989); *Dellums* v. *Powell*, 561 F.2d 242, 245-49 (D.C. Cir. 1977). Plaintiffs have made no effort to make any such showing of need in this case. Indeed, as this Court has made clear, principles of comity require strict limitations on discovery from *all* high-ranking executive branch officials. *See Simplex Time Recorder Co.* v. *Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985)); *In re Papandreou*, 139 F.3d at 253-54. Here, the President assigned the Vice President and the other members of the NEPDG to fulfill core executive branch functions under Article II of the Constitution. In this

context, especially, the Constitution and principles of comity preclude discovery of the President or Vice President.

By allowing discovery to proceed on the strength of bare allegations of wrongdoing, the decision below and the panel decision conflict with precedents of this Court and the Supreme Court limiting discovery in APA and mandamus actions, affording a presumption of regularity to executive action, and prohibiting discovery against high-ranking officials absent a showing of need. This Court should grant en banc review to address these conflicts and to address the serious separation-of-powers concerns raised by a coordinate branch, and by the Vice President himself.

CONCLUSION

For the foregoing reasons, this Court should grant rehearing, or in the alternative, rehearing en banc.

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ADDENDUM

CERTIFICATE AS TO PARTIES, AMICI, AND RELATED CASES

Pursuant to Circuit Rules 35(c) and 28(a)(1)(A), the petitioners/appellants submit the following certification:

The respondents-appellees are Judicial Watch, Inc. and the Sierra Club. Petitioners- appellants are: Richard B. Cheney, Vice President of the United States; the National Energy Policy Development Group; John W. Snow, Secretary of the Treasury; Gale A. Norton, Secretary of the Interior; Ann M. Veneman, Secretary of Agriculture; Donald L. Evans, Secretary of Commerce; Norman Y. Mineta, Secretary of Transportation; Spencer Abraham, Secretary of Energy; Colin L. Powell, Secretary of State; Joseph L. Allbaugh, Director, Federal Emergency Management Agency; Marianne L. Horinko, Acting Administrator, Environmental Protection Agency; Patrick H. Wood, III, Chairman, Federal Energy Regulatory Commission; Joshua B. Bolton, Director, Office of Management and Budget; Joshua Bolton, Assistant to the President and Deputy Chief of Staff for Policy; Stephen Friedman, Assistant to the President for Economic Policy; Andrew Lundquist, Executive Director, National Energy Policy Development Group; John D. Ashcroft, U.S. Attorney General.

In the district court, the following individuals were also named as defendants, but were dismissed from the case prior to the petition/appeal: Mark Racicot, Republican National Committee; Haley Barbour; and Thomas Kuhn. A further individual, Kenneth Lay, was named as a defendant in the Complaint but did not appear. The following individuals were named as

defendants in their official capacities and have subsequently been succeeded in office by the individuals identified above: Paul O'Neill, Secretary of the Treasury; Christine Todd Whitman, Administrator, Environmental Protection Agency; Mitchell E. Daniels, Jr., Director, Office of Management and Budget; Larry Lindsey, Assistant to the President for Economic Policy

The National Resources Defense Council appeared as amicus curiae in the district court.

This case has not previously been before this Court and counsel is not aware of any related case currently pending in this court or any other court.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August 2003, I am causing two copies of the foregoing Petition for Rehearing and Suggestion for Rehearing En Banc to be served on the following by Federal Express, next business day delivery:

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GLOSSARY

AAPS	*Association of American Physicians & Surgeons, Inc.* v. *Clinton*, 997 F.2d 898 (D.C. Cir. 1993)
APA	Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*
App.	Appendix
FACA	Federal Advisory Committee Act, 5 U.S.C. App. §§ 1 *et seq.*
GSA	General Services Administration Energy Policy Development Group
slip. op.	*In re Richard B. Cheney, Vice President of the United States, et al.*, No. 02-5354 (D.C. Cir. July 8, 2003)

TABLE OF CONTENTS

	Page
GLOSSARY	1
CONCISE STATEMENT OF THE ISSUES AND THEIR IMPORTANCE	2
STATEMENT OF FACTS	4
ARGUMENT	4
I. THIS COURT HAS BOTH MANDAMUS AND APPELLATE JURISDICTION	4
II. SEPARATION-OF-POWERS PRINCIPLES PRECLUDE DISCOVERY INTO THE ADVISORY ACTIVITIES OF THE VICE PRESIDENT AND OTHER PRESIDENTIAL ADVISORS BASED ON UNSUPPORTED ALLEGATIONS THAT NON-GOVERNMENTAL MEMBERS PARTICIPATED IN THOSE ACTIVITIES	8
A. As Construed By The District Court And The Panel Majority, The "DeFacto" Member Doctrine Adopted In *AAPS* Renders The FACA Unconstitutional	9
B. Discovery Would Violate Longstanding Principles That Generally Preclude Discovery Into The Internal Workings Of The Executive Branch And That Afford Executive Branch Actions A Presumption Of Regularity	12
CONCLUSION	15
ADDENDUM	

TABLE OF AUTHORITIES

Cases:	**Page**
American Fed. of Gov't Employees, AFL-CIO v. *Reagan*, 870 F.2d 723 (D.C. Cir. 1989)	15
**Association of American Physicians & Surgeons, Inc.* v. *Clinton*, 997 F.2d 898 (D.C. Cir. 1993)	1, 9, 10
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971)	13, 14
Claybrooke v. *Slater*, 111 F.3d 904 (D.C. Cir. (1997)	10
Dellums v. *Powell*, 561 F.2d 242 (D.C. Cir. 1977)	15
* *In re Executive Office of the President*, 215 F.3d 20 (D.C. Cir. 2000)	5
Judicial Watch, Inc. v. *Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20 (D.D.C. 2002)	12
Morris v. *Sullivan*, 897 F.2d 553 (D.C. Cir. 1990)	15
**Nader* v. *Baroody*, 396 F. Supp. 1231 (D.D.C. 1975)	7
In re Papandreou, 139 F.3d 247 (D.C. Cir. 1998)	6, 7, 8, 15
Professional Air Traffic Controllers Orgs. (PATCO) v. *FLRA*, 672 F.2d 109 (D.C. Cir. 1982)	13
* *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440 (1989)	7
* *In re Sealed Cases*, 151 F.3d 1059 (D.C. Cir. 1998)	6, 7
Simplex Time Recorder Co. v. *Secretary of Labor*, 766 F.2d 575 (D.C. Cir. 1985)	15

Texas Rural Legal Aid,, Inc. v. *Legal Serv. Corp.*, 940 F.2d 685 (D.C. Cir. 1991) 14
United States Postal Serv. v. *Gregory*, 534 U.S. 1 (2001) 15
United States v. *Armstrong*, 517 U.S. 456 (1996) 15
United States v. *Chemical Found.*, 272 U.S. 1 (1926) 15
* *United States* v. *Nixon*, 418 U.S. 683 (1974) 8
United States v. *Poindexter*, 727 F. Supp. 1501 (D.D.C. 1989) 15

Statutes:

Federal Advisory Committee Act (FACA): 5 U.S.C. App. §§ 1 *et seq.* 1

Regulations:

41 C.F.R. § 101-6.1003 (2000) 11

Miscellaneous:

Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 Yale L.J. 51 (1994) 1
NEPDG Report, www.whitehouse.gov/energy/National-Energy-Policy.pdf 2

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5354

IN RE RICHARD B. CHENEY,
VICE PRESIDENT OF THE UNITED STATES, PETITIONERS

RESPONSE TO PETITION FOR REHEARING AND TO SUGGESTION FOR REHEARING EN BANC

I. INTRODUCTION AND STATEMENT OF ISSUES

The panel majority correctly refused to issue a writ of mandamus, recognizing that Petitioners have failed to "identify some 'harm' flowing from the district court's challenged orders that cannot be remedied either in the district court or on appeal following final judgment." *In re Cheney*, 334 F.3d 1096, 1104 (D.C. Cir. 2003). Petitioners request a rehearing to answer "separation-of-powers questions" that this case does not, and may never, present: whether the Constitution forbids *disclosure* of the process by which the *National Energy Policy Development Group* advised the *President*. Petition for Rehearing & Suggestion for Rehearing En Banc ("Pet.") 1. That "question[]" is mistaken in each of its three premises. *Id.*

First, the District Court will not necessarily have to determine whether the *National Energy Policy Development Group* (the "Task Force") was an advisory committee governed by the Federal Advisory Committee Act, 5 U.S.C. App. 2 (2003) ("FACA"). The complaints allege as well that energy industry representa-

tives were members of lower-level "sub-groups" that assisted the Task Force. Sierra Club's Complaint for Declaratory & Injunctive Relief ("Complaint") ¶¶ 18-24 (App. 108-110); Declaration of Karen Knutson ("Knutson Decl.") ¶ 13 (App. 261-62); App. 118 (memorandum authorizing formation of sub-groups). Depending upon the outcome of discovery, the ultimate question may be whether those sub-groups—rather than the Task Force—are subject to FACA and its requirements. *See Judicial Watch, Inc. v. National Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 37 (D.D.C. 2002) (App. 189). *See also Association of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993) ("*AAPS*") (noting that subordinate "working group" may be subject to FACA if non-federal employees were members).

Second, there is nothing to suggest that *the President* was substantively involved in the proceedings of the Task Force. President Bush issued a public memorandum announcing the Task Force's creation, was presented with the Task Force's conclusions, and received the Task Force's published report; the evidence submitted by the Petitioners indicates no further role for the President. Knutson Decl. ¶¶ 3-14 (App. 258-262). Vice President Cheney chaired the Task Force, and subordinate agency and White House officials were involved with the activities of the Task Force's subgroups. *Id.* Their presence raises far lesser constitutional concerns than would that of the Chief Executive. *See In re Sealed Case*, 121 F.3d 729, 748-49 (D.C. Cir. 1997). The Constitution does not grant the Vice President, or other Executive branch officials, any of the enumerated Executive powers upon which the doctrine of separation of powers is based. *See Morrison v. Olson*, 487 U.S. 654, 698-99 & 729 (1988) ("[T]he

Founders . . . provided that all executive powers would be would be exercised by a *single* Chief Executive") (Scalia, J., dissenting); *United States v. Nixon*, 418 U.S. 683, 705-06 (1974) (holding that "protection of the confidentiality of Presidential communications" is based on "powers and privileges [that] flow from the nature of enumerated powers").

Third, the District Court's orders do not demand *disclosure* of any materials that "intru[de] into Executive Branch decisionmaking." Pet. 9. The District Court has asked Petitioners to offer specific objections to plaintiffs' proposed discovery, and to specify any privileged information that they wish to withhold; "[c]ompliance with the Court's orders will not necessarily result in the plaintiffs obtaining *any* discovery." *Judicial Watch, Inc. v. National Energy Policy Dev. Group*, 233 F. Supp. 2d 16, 27 (D.D.C. 2002). *See Cheney*, 334 F.3d at 1100-01. If Petitioners believe that plaintiffs' discovery requests are overbroad, they may present objections to assist the District Court in narrowing the scope of the requests. *See id.* at 1105-06. If the discovery requests encompass communications that implicate Executive decisionmaking, Petitioners can assert the constitutional privileges that protect the integrity of such decisionmaking. *See id.* at 1105. *See generally Sealed Case*, 121 F.3d at 752. And if the District Court's construction of those objections and privileges threatens the disclosure of information that would genuinely inhibit Executive functions, Petitioners may then seek this Court's intervention to prevent that disclosure. *See In re Executive Office of the President*, 215 F.3d 20, 23 (D.C. Cir. 2000) (party may seek writ of mandamus to challenge order requiring "disclosure [of

highly privileged material]" (alteration in original and citation omitted)).[1]

The District Court's orders will result in only this: eight Department of Justice attorneys will review twelve boxes of documents, prepare objections to plaintiffs' proposed discovery, and assemble a privilege log substantiating Petitioners' reasons for withholding any confidential information. Defts. Response to Order of Oct. 28 (Oct. 29, 2002) ("Defts. Response") at 1-2 (describing efforts needed to comply with orders). As Petitioners now admit, the sole burden imposed by those tasks is "review [of] the process" by which the Task Force operated. Pet. 5. That burden will not materially affect Presidential decision-making, and cannot offend separation of powers or cause irreparable harm. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 451-52 (1977) ("mere screening of [Executive] materials" for purposes of privilege assertion "constitutes a very limited intrusion" and does not violate separation of powers); *Renegotiations Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable

[1] Petitioners contend that the panel majority ignored *In re Sealed Case*, 151 F.3d 1059 (D.C. Cir 1998) (*Sealed Case II*). Pet. 6. In *Sealed Case II*, this Court issued a writ of mandamus because the independent counsel "was ordered to produce . . . the documents requested," *Sealed Case II*, 151 F.3d at 1062, in an ancillary civil proceeding, after the petitioner "asserted something akin to a privilege," *id.* at 1065. Mandamus was therefore required to prevent the "*disclosure* of arguably *'privileged'* material," *id.* (emphasis added). The panel majority here refused to issue the writ precisely because the District Court's orders require no such disclosure. *Cheney*, 334 F.3d at 1104.

cost, does not constitute irreparable injury." (citation omitted)).[2]

A contrary conclusion would be tantamount to a ruling that any discovery of any Executive official, in and of itself, violates separation of powers—a proposition that the Supreme Court and this Court have squarely rejected. "[T]he Judiciary may severely burden the Executive Branch by reviewing the legality of [even] the President's official conduct." *Clinton v. Jones*, 520 U.S. 681, 705 (1997); *Dellums v. Powell*, 561 F.2d 242, 245-46 (D.C. Cir. 1977). The District Court is following the well-established ground-rules governing litigation against the Executive—under which discovery is permitted, but circumscribed by the rules of Executive privilege. *See Sealed Case*, 121 F.3d at 742-746. Those rules create no "exceptional circumstances" that would warrant interlocutory appeal or justify rehearing. *Cheney*, 334 F.3d at 1101-02.

For the reasons set forth in the panel majority and concurring opinions, as well as those above, the District Court's orders have not created any "separation of powers conflict." *Id.* at 1105. As explained in Section II, below, this case does not present an inevitable

[2] The dissenting opinion quotes *Nixon v. Fitzgerald* as recognizing that "diversion of the [the President's] energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Cheney*, 334 F.3d at 1117 (quoting 457 U.S. 731, 751 (1982)). The Supreme Court has dismissed that language as "dicta," and clarified that "our dominant concern [in *Nixon*] was with diversion of the *President's* attention . . . caused by needless worry as to the *possibility of damages actions* stemming from any particular official decision." *Clinton*, 520 U.S. at 694 n.19 (emphasis added). That concern does not apply; this suit does not seek damages, and is not directed at the President.

"collision" between FACA and the Constitution. Pet. 9. And, as detailed in Section III below, even if the Court were to bypass the normal high standards governing interlocutory appeal, Petitioners are wrong on the merits; the law does not prevent discovery in this case.

II. THIS CASE PRESENTS NO INEVITABLE CONSTITUTIONAL "COLLISION"

The District Court has not yet had an opportunity to determine whether any non-federal employees participated in the activities of Task Force sub-groups, or the Task Force itself, in a manner that, under *AAPS*, would implicate FACA.[3] Petitioners nevertheless ask this Court to over-rule *AAPS* on constitutional grounds, and to re-define "members" of advisory committees to be only those that the government formally designates as members. Pet. 9-11. There is no reason to reach that issue before it is presented; "a court should avoid, not seek out, a constitutional issue the resolution of which is not essential to the disposition of the case before it." *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001) (citing *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)). Further factual and legal development—in particular, as regards the Task Force's sub-groups—could significantly

[3] This Court recognized in *AAPS* that if a private citizen "regularly attends and fully participates in [advisory committee] meetings as if he were a 'member,' he should be regarded as a member." 997 F.2d at 915. Because "his status as a private citizen would disqualify the working group [at issue] from [FACA's] exemption for meetings of full-time government employees," the sub-group or group in which that person participated would be subject to FACA, and the government's failure to abide by FACA's disclosure provisions would violate the law. *Id.*

change the contours of that constitutional issue, or eliminate it entirely.[4]

A. The Task Force's Sub-Groups Present Lesser Constitutional Concerns, If Any

Petitioners present the most difficult constitutional issue encompassed within the complaints' allegations: whether FACA could be applied to the President's interactions with the Task Force. That issue may never arise. The Task Force was assisted by numerous lower-level White House and agency staff, some of whom created subordinate "working groups" to address particular issues. *See* U.S. General Accounting Office, Energy Task Force: Process Used to Develop the National Energy Policy (August 2003) (attached as Ex. A) at 7, 11-16 (describing "Support Group" and "Working Group" in addition to Task Force Principals). *See also* Knutson Decl. ¶ 13 (App. 261-62); Complaint ¶¶ 18-24 (App. 189). The Task Force's sub-groups did not necessarily comprise "the President's closest advisors," Pet. 1; even the highest working group was chaired by an Energy Department employee "assigned" to the Vice President's office to assist the Task Force. Knutson Decl. ¶ 3 (App. 258).[5]

[4] As the District Court recognized, there is no principled way to determine whether application of the statute would violate the Constitution until discovery has demonstrated which specific activities would otherwise be governed by FACA. *See Judicial Watch*, 219 F. Supp. 2d at 45-46 (App. 192) (noting that analysis requires "nuanced, fact-intensive" inquiry).

[5] It is not yet clear how many sub-groups existed, and what lower-level staff they included. Plaintiffs' discovery is intended, in part, to determine how many such sub-groups existed, and to establish that they met the definition of an "advisory committee"

Discovery may show that energy industry representatives were members (*de facto* or otherwise) of one or more of the subordinate working groups, but not the Task Force – an identical scenario to that presented in *AAPS*. 997 F.2d at 912. *See* Ex. A at 15-18. That scenario would raise none of the constitutional issues suggested by Petitioners and by the dissenting opinion, *Cheney*, 334 F.3d at 1117; it would not require the District Court or this Court to apply FACA to the Task Force. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (Constitution affords "high officials . . . greater protection than those with less complex discretionary responsibilities"). *See also Sealed Case*, 121 F.3d at 748 ("[T]he separation of powers concerns that arise when the President is personally subjected to judicial process are not implicated when a court exercises jurisdiction over other executive branch officials.").

This case is as much about the Task Force's subordinate groups as it is about the Task Force itself. Petitioners ask the Court to make a premature, unnecessary, and challenging constitutional ruling, with sweeping implications. In so doing, they ignore a significant portion of plaintiffs' claims, and the myriad factual and legal developments that could obviate the need for that ruling.

set out in *AAPS*. 997 F.2d at 913-15 (noting that whether collection of individuals may be considered an "advisory committee" for purposes of FACA depends on whether they "render advice or recommendations, *as a group*, and not as a collection of individuals" and "significantly interact with each other"). That determination requires some investigation into interactions between Task Force staff and personnel. *See Cheney*, 334 F.3d at 1105-06 (questioning need for information concerning such interactions). The District Court has indicated that it will tailor that investigation to avoid any inappropriate intrusion into Executive decisionmaking; for example, it may limit inquiry to the interactions of those Task Force staff and personnel who communicated significantly with private citizens. *See Judicial Watch*, 233 F. Supp. 2d at 30 (D.D.C. 2002) (promising "tightly reined" discovery).

B. This Court Should Not Over-Rule AAPS Or Issue A Writ of Mandamus Before Any Constitutional Issue Has Been Presented

As the District Court and panel majority recognized, there is no need to address FACA's constitutionality or the validity of *AAPS*, as applied to the Task Force, until the facts and law present that issue. *Judicial Watch*, 219 F. Supp. 2d at 37 (App. 189); *Cheney*, 334 F.3d at 1108. Until then, Petitioners face only two burdens: (1) the need to respond to plaintiffs' discovery, via objections, assertions of privilege, and the disclosure of non-privileged, non-objectionable materials; and, (2) the possibility that the Court might eventually find that FACA could be applied to the Task Force. Neither of those burdens merits a writ of mandamus. The first implicates no significant constitutional concerns. *See above*, pages 3-4. And the possibility that a court might apply FACA to the Task Force imposes no burden at all. Petitioners claim that this case will "cause the President to hesitate before creating any formal . . . group consisting wholly of heads of executive departments." Pet. 11. As this Court held in rejecting a virtually identical claim:

> [W]e do not take seriously [the Executive Office of the President]'s argument that the President and the members of the White House Office are now disabled from functioning because of an implicit threat underlying the District Court's order. . . .

> In activities unrelated to the instant case, the White House, as it has done for many years on the advice and counsel of the Department of Justice, remains free to adhere to the position that [the Act] does not cover members of the White House Office.

Executive Office of the President, 215 F.3d at 24-25. If the District Court eventually finds that the Task Force was subject to FACA, and that FACA may be constitutionally applied to the Task Force, that decision will "be subject to review on appeal following final judgment." *Id.* Until then, this case has no effect on the White House's conduct.

In short, this case presents no reason to depart from the normal rules governing judicial review. The dissenting opinion would over-turn *AAPS* now, because *AAPS* lacks "any principled standard for determining who and who is not a *de facto* member of a Presidential committee." *Cheney*, 334 F.3d at 1115.[6] The standard set out in *AAPS*—whether a private citizen "regularly attend[ed] and fully participate[d] in working group meetings as if he were a 'member'"—presents ques-

[6] Allowing the government to unilaterally define a committee's members may present an easier standard, but—as with any standard based on form rather than substance—it would allow the government to evade FACA at will. President Clinton, for example, could have named only full-time federal employees as formal "members" of his Health Care Task Force, while delegating policy-making authority to private citizens whom he labeled "consultants." *See AAPS*, 997 F.2d at 915. That result would ill serve Congress's intent to "ensure 'public accountability' on the part of the Executive Branch." *Public Citizen v. National Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419, 433 (D.C. Cir. 1989) (Edwards, J., concurring in part and dissenting in part).

tions of the sort routinely resolved in civil litigation. *See, e.g., In re Vebeliunas*, 332 F.3d 85, 91 (2d Cir. 2003) (applying New York law governing piercing the corporate veil, asking whether "the owner exercised such control that the corporation has become a mere instrumentality of the owner"). To the extent that answering those questions entails discovery of Executive decision-making, the law provides various privileges to prevent the disclosure of information that would genuinely inhibit Executive functions. *Sealed Case*, 121 F.3d at 742-53 (describing privileges and noting that executive privilege extends as far as necessary to avoid "imped[ing] the President's ability to perform his constitutional duty" (citation omitted)).

The district courts have consistently handled such potentially sensitive matters without infringing upon Executive prerogatives. *E.g., Association of Am. Physicians & Surgeons v. Clinton*, 879 F. Supp. 103 (D.D.C. 1994) (determining documents to which plaintiffs would be entitled under de facto membership theory); *Natural Resources Def. Council v. Curtis*, 189 F.R.D. 4 (D.D.C. 1999) (establishing discovery guidelines in FACA case); *Alexander v. F.B.I.*, 194 F.R.D. 299 (D.D.C. 2000) (applying discovery and privilege rules in response to document requests directed towards White House offices). The District Court is fully capable of doing so here. *See Clinton*, 520 U.S. at 704 ("Sitting Presidents have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive Branches can scarcely be thought a novelty.").

III. THE LAW DOES NOT CATEGORICALLY FORBID DISCOVERY IN THIS CASE.

Petitioners have not demonstrated harm sufficient to warrant interlocutory review. *Cheney*, 334 F.3d at 1104. Even if such review were appropriate, moreover, the District Court's refusal to foreclose discovery is wholly in keeping with established law.

A. The Rules Permit Discovery Regardless of a Party's Status.

Discovery is an essential component of judicial review. The law consequently provides a "broad presumption . . . in favor of discovery," tempered only by the exceptions set out by the available privileges. *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1349 (D.C. Cir. 1984) (Starr, J., dissenting) (citing J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 26.5 (2d ed. 1976). "[N]o type of action, within the coverage of the Federal Rules, is excepted from the operation of [the discovery] rules." *Weisberg v. Webster*, 749 F.2d 864, 868 (D.C. Cir. 1984). Those rules establish that "'the public . . . has a right to *every man's* evidence,' except for those persons protected by a constitutional, common-law, or statutory *privilege*." *United States v. Nixon*, 418 U.S. at 709 (alterations in original, emphasis added, and citation omitted). The general rule is, accordingly, that discovery is permitted regardless of a party's status, barring only the assertion of a valid privilege: "[I]t would be quite anomalous indeed for a witness . . . to be permitted to avoid testifying merely because of his status. That is simply not the way our system works. Anyone who enjoys a privilege against testifying must assert it . . . ." *United States v. North*, 910 F.2d 843, 951 (D.C. Cir. 1990) (Silberman, J., concurring in part and dissenting in part) (discussing executive privilege), *decision withdrawn and superceded in unrelated part by United States v. North*, 920 F.2d 940 (D.C. Cir. 1990).[7]

Petitioners ask this Court to reverse that rule, and demand more than "mere unsupported allegations" before proceeding to discovery. Pet. 5. Until discovery, however, a plaintiff need only offer allegations; "the liberal system of 'notice pleading' set up by the Federal Rules" requires "only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Leatherman v. Tarrant Cty. Narcotics Intel. & Coord. Unit*, 507 U.S. 163, 168 (1993) (citation omitted). The Rules do not permit the judiciary to impose a greater threshold requirement. *Id.* at 168-69. Rather, courts "rel[y] on liberal discovery rules and summary judgment motions to define disputed facts and issues and dispose of unmeritorious claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-13 & 514 (2002).

That process presents no significant danger of harassment of the Chief Executive. *See* Pet. 11. While the Rules allow plaintiffs to pursue factual development through discovery, they do not permit the filing of baseless suits. Rule 11 demands that "any papers filed with the court [be] well grounded in fact [and] legally tenable." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S.

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[7] The majority in *United States v. North* quashed the subpoena at issue on entirely separate grounds. 910 F.2d at 890 (subpoenaed testimony "immaterial to North's defense"). Judge Silberman would have allowed discovery, and therefore dissented from the majority opinion. *See id.* at 948-50. In so doing, Judge Silberman concluded that executive privilege provided no bar to discovery—an issue the majority did not reach.

384, 393 (1990). Those standards are demonstrably met here. The participation of energy industry representatives in the Task Force's proceedings has been well documented by Congress and the press. *See* Ex. A. Established privileges and the District Court's discretion to control the discovery process, meanwhile, provide ample means to ensure that discovery does not interfere with Executive functions. *See above*, Section I.

B. There Is No Rule Preventing Discovery Of Government Officials

The dissenting opinion posits a rule prohibiting any "discovery into the internal workings of government departments without 'strong preliminary showings of bad faith." *Cheney*, 334 F.3d at 1115-16. As the panel majority recognized, there is no such narrow rule. *Id.* at 1111. *See also National Nutritional Foods Ass'n v. Food & Drug Admin.*, 491 F.2d 1141, 1145 n.5 (2d Cir. 1974) (noting that discovery is permitted where the government's submissions "do[] not provide an adequate basis for judicial review" (citation omitted)). The law does provide privileges to protect government deliberations; notably, the 'deliberative process privilege' protects "intra-agency memoranda and other documents recording how and why decisions or recommendations have been reached." *Cheney*, 334 F.3d at 1115-16 (Randolph, J., dissenting). *See Sealed Case*, 121 F.3d 737-38. *See also Checkosky v. Securities & Exchange Comm'n*, 23 F.3d 452, 489 (D.C. Cir. 1994) (Randolph, J.) ("[A]gency deliberations. . . are *privileged* from discovery) (emphasis added)).

Those privileges must, however, be properly invoked —something Petitioners have refused to do. Neither the deliberative process nor any other privilege insulates *all* information within Petitioners' control from discovery, any more than the attorney-client privilege insulates all information in an attorney's possession from discovery. *See Senate of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987) (agency invoking deliberative process privilege under Freedom of Information Act ("FOIA") bears the "burden of 'establish[ing] [its] right to withhold evidence" (citation omitted)); *Doherty v. Fairall*, 413 F.2d 381, 381 (D.C. Cir. 1969) (Burger, J.) (rejecting claim that privilege protects materials in attorney's possession). *See also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1973) (deliberative process privilege under FOIA is coextensive with privilege in civil litigation).

Much of what plaintiffs seek—*e.g.* the extent of private citizens' participation in the sub-groups' and Task Force's activities—does not implicate intra-agency memoranda or the agency's deliberative processes. *See U.S. Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12-13 (2001) (deliberative process privilege does not apply to communications with non-government personnel). Petitioners cannot withhold such materials simply by virtue of Petitioners' status as federal employees; they must demonstrate that the withheld documents do, in fact, relate to protected deliberative processes, by properly asserting the deliberative process privilege. The District Court has invited Petitioners to make that showing. Unless and until they do so, Petitioners are subject to the normal rules of civil litigation. *See Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982) ("[A]n executive official's claim to absolute immunity must be justified by reference to the public interest in the special functions of his office, *not the mere fact of high station.*" (emphasis added)).

C. The Administrative Procedure Act Does Not Prohibit Discovery.

As the both the majority and the dissent recognized, the Administrative Procedure Act cannot bar discovery, because this case is not governed by the Administrative Procedure Act; it is brought pursuant to the federal mandamus statute, 28 U.S.C. § 1361 (2003). *Cheney*, 334 F.3d at 1103, 1113 n.1 & 1116. Even if Administrative Procedure Act standards did apply, they would not prohibit discovery under all circumstances; *inter alia*, the Act permits discovery where "the administrative record is inadequate for judicial review." *Id.* at 1111 (Edwards, J., concurring). The District Court expressly found here that the "record" submitted by Petitioners—"which consists in its entirety of the President's memorandum to the Vice-President establishing the [Task Force], the [Task Force]'s final report, and [the litigation] affidavit of the [Task Force]'s former Deputy Director"—is "so bare that it prevents effective judicial review." *Judicial Watch*, 233 F. Supp. 2d at 29-30.

Petitioners argue that the President's memorandum conclusively establishes the composition of the Task Force, and that the District Court may not permit discovery to investigate whether "the President was disobeyed." Pet. 14. As a factual matter, the memorandum does not instruct the Vice President to exclude private citizens. App. 117. As a legal matter, the Administrative Procedure Act would not permit Petitioners to selectively disclose some documents, withhold others, and then insist that the disclosed documents are conclusive. *See Walter O. Boswell Memorial Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) ("To review less than the full administrative record might

allow a party to withhold evidence unfavorable to its case, and so the APA requires review of 'the whole record.'"). And in any event, the memorandum says nothing about the composition of the various subgroups that supported the Task Force's activities, though it expressly authorizes the establishment of such "subordinate working groups to assist the [Task Force] in its work." App. 118.

D. Petitioners Are Not Immune From Suit

Petitioners have no constitutional immunity from this suit, or any other civil suit seeking injunctive relief. *See Harlow v. Fitzgerald*, 457 U.S. 800, 808-17 (1982) (immunity extends only to suits seeking civil damages). That clear contrary law notwithstanding, Petitioners ask this Court to extend them "immunity" from discovery, claiming that the panel majority "sidestepped" this Circuit's decision in *In re Papandreou*, 139 F.3d 247 (D.C. Cir. 1998). Pet. 6. In *Papandreou* this Court considered, via mandamus, a claim of "sovereign immunity," reasoning that the law of sovereign immunity conferred "immunity from trial and the attendant burdens of litigation." 139 F.3d at 251 (citation omitted). Not even the President possesses a comparable immunity; the Supreme Court has "long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law." *Clinton*, 520 U.S. at 703. Petitioners are not immune from the "burdens of litigation," *Papandreou*, 139 F.3d at 251. As the Supreme Court has held: *"[t]he fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of [even] the Chief Executive is not sufficient to establish a violation of the Constitution."* *Clinton*, 520 U.S. at 703.

IV. CONCLUSION

For the reasons set forth above, Sierra Club and Judicial Watch respectfully request that the petition for rehearing be denied.

Respectfully submitted this 29th day of August, 2003,

By:

_____

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CERTIFICATE OF SERVICE

I certify that on August 29, 2003, I served the foregoing "Response to Petition for Rehearing and to Suggestion for Rehearing En Banc" on counsel for all parties at the addresses, and by the means specified, below:

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